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No. 06-984

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In The

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

APPENDIX TO BRIEF FOR RESPONDENT

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MANDATE FROM
COURT OF CRIMINAL APPEALS
Austin, Texas

THE STATE OF TEXAS,
TO THE 339TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY – GREETINGS:

Before our COURT OF CRIMINAL APPEALS, on the 30th day of April A.D. 1997 the cause upon appeal to revise or reverse your Judgment between

JOSE ERNESTO MEDELLIN,

– VS. –

THE STATE OF TEXAS,

CCRA No. 71,997
Tr. Ct. No. 675430

was determined: and therein our said COURT OF CRIMINAL APPEALS made it's order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being considered, because it is the Opinion of this Court that there was no error in the judgment, it is **ORDERED, ADJUDGED AND DECREED** by the Court that the judgment be **AFFIRMED**, in accordance with the Opinion of this Court, and that the appellant pay all costs in this behalf expended, and that this Decision be certified below for observance."

The Appellant's Motion for Rehearing is Denied.

WHEREFORE, We command you to observe the Order of our said **COURT OF CRIMINAL APPEALS** in this behalf

and in all things have it duly recognized, obeyed and executed.

WITNESS, THE HONORABLE MICHAEL J. MCCORMICK, Presiding Judge

of our said **COURT OF CRIMINAL APPEALS**, with the Seal thereof annexed, at the City of Austin, this 16th day of May A.D. 1997.

TROY C. BENNETT, JR., Clerk
BELVA MYLER, Deputy Clerk

Appeal from HARRIS County
No. 71,997

JOSE ERNESTO MEDELLIN,

Appellant

– v. –

THE STATE OF TEXAS,

Appellee

OPINION

Appellant, Jose Ernesto Medellin, was convicted in September of 1994 of a capital murder committed in June of 1993. TEX. PENAL CODE ANN. §19.03(a)(2). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure art. 37.071 §§ 2(b) and 2-(e), the trial judge sentenced appellant to death.[1] Article 37.071 § 2(g). Direct appeal is automatic. Article 37.071 § 2(h). We will affirm.

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[1] Any subsequent references to Articles are to those in the Texas Code of Criminal Procedure unless otherwise indicated.

Appellant raises nine points of error, including challenges to the sufficiency of the, evidence at both stages of trial. In his first point of error, appellant asserts that this cause should be abated and remanded to the trial court for the trial judge to enter written findings of fact and conclusions of law regarding the outcome of a hearing on the voluntariness of appellant's confession as required by Article 38.22 § 6 of the Texas Code of Criminal Procedure. Because this has been done, appellant's first point of error is now moot.[2]

A recitation of the facts will be helpful in addressing the remaining points of error. Looking at the evidence in the light most favorable to the jury's verdict, the record reveals the following facts: On the night of June 24, 1993, a gang called the "Black and Whites" had come together to initiate a new member, Raul Villareal. The other gang members present were appellant, Peter Cantu, Roman Sandoval, Efrain Perez, and Sean O'Brien. Roman's brother, Frank, and appellant's fourteen-year-old brother, Venancio, were also tagging along. The initiation involved fighting each member of the gang for a five to ten minute period. After the fighting was over, Raul was welcomed into the gang.

Meanwhile, fourteen-year-old Jennifer Ertman and sixteen-year old Elizabeth Pena were visiting a girl-friend. Around 11:15 p.m., Jennifer and Elizabeth decided to head for their respective homes by way of a shortcut across the

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[2] This cause was abated on May 8, 1996, pursuant to Tex. R. App. Proc. 40(b)(2). *See Green v. State*, 906 S.W.2d 937 (Tex. Crim. App. 1995). The requested findings of fact and conclusions of law were thereafter forwarded to this Court. The trial court having complied with our order, we now continue the appeal of this cause.

railroad tracks. Jennifer and Elizabeth first encountered Roman and Frank as they made their way home, but managed to pass the brothers without incident. However, as they passed appellant, he attempted to engage Elizabeth in conversation. When Elizabeth tried to run from appellant, he grabbed her and threw her to the ground. Elizabeth screamed for Jennifer to help her. In response to her friend's cries, Jennifer ran back to help, but Peter and Sean grabbed her and threw her down as well. At this point, the Sandoval brothers decided that it was time to leave.

Subsequent boastful statements of appellant and other gang members revealed that what ensued was a brutal gang rape of both of the girls. After the girls were thrown to the ground, the gang members orally, vaginally, and anally raped both of them. After the assault, appellant, Raul, Efrain, and Peter regrouped at Peter's house where he lived with his brother and sister-in-law, Joe and Christina Çantu, to brag about their exploits. Christina noticed that Raul was bleeding and that Efrain had blood on his shirt. She asked the group what had occurred and appellant responded that they "had fun" and that their exploits would be seen on the television news. Appellant was hyper, giggling, and laughing. He boasted to Joe and Christina that the group had met two "hos" [sic] and had sex with them. He also told the couple that two girls had been talking to them and that he punched one of the girls because she had started screaming after he grabbed her.

Appellant related to Joe and Christina that he sexually assaulted one of the girls and bragged about having "opened" her since she had apparently been a virgin. As if to accentuate his conquest, appellant showed Christina his blood soaked underwear. Appellant related that after

another gang member sexually assaulted the second girl, he "turned her around" and anally raped her. Appellant also bragged of having forced both girls to engage in oral sex with him. Peter joined the group shortly thereafter and began to divide up the money and jewelry that had been taken from the two girls. Peter gave appellant a ring with an "E" design on it so that he could give it to his girlfriend, Esther.

When Christina asked the group what happened to the girls, appellant told her that they had been killed so that they could not identify their attackers. Appellant then elaborated that it would have been easier with a gun, but because they did not have one at the scene of the incident, he took off one of his shoelaces and strangled at least one of the girls with it.[3] Both Joe and Christina noted that appellant complained of the difficulty group encountered in killing the girls. After appellant related the difficulty he encountered in strangling one of the girls, he said that he put his foot on her throat because she would not die.

Christina subsequently convinced her husband to report the incident to the police. By the time the bodies were discovered, they were so badly decomposed that dental records were required to identify them. However, enough tissue remained for the medical examiner to

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[3] Apparently all of the gang members were talking about having killed the two girls which resulted in some degree of confusion on the part of the witnesses. However, Christina testified that she understood appellant to have said that he personally participated in killing both of the girls, while Joe testified that he understood appellant to have said that he strangled one of the girls while his companions killed the other girl.

determine that each girl had died of a trauma to the neck consistent with strangulation.

Eventually, all of the individuals who participated in the rapes and murders were apprehended. After appellant was arrested, he gave a written and then an oral, taperecorded statement, the latter of which was never offered into evidence at trial. In the written statement, appellant admitted to having had oral sex with Elizabeth, but commented that he only peripherally participated in her murder.

At the punishment stage of trial, appellant's parents testified that appellant had been a good student and had made good grades until he entered the sixth grade. After that point, appellant's behavior deteriorated rapidly. Appellant was suspended from middle school in the Fall of 1990 for "misconduct and repeated misbehavior." In high school, appellant was well known to administrators due to his repeated disciplinary violations. In January of 1992, appellant was restrained by an assistant principal from attacking another student. Furthermore, appellant repeatedly threatened to kill the assistant principal and to "fix it" so that he could not father any more children. Appellant told the assistant principal that life meant nothing to him. (appellant) and that someday he would be featured on television or the front page of the newspaper as the result of having killed someone, "probably a cop." In October of 1992, appellant was involved in a gang related fight at school which resulted in his expulsion from school and subsequent placement at an alternative school.

Appellant was also known to the police. In January of 1992, police were called to a restaurant in response to a disturbance call involving a terroristic threat. When

initially confronted by police, appellant refused to stop or to remove his hand from his pocket. He was later found to have a .38 caliber pistol concealed in his pocket. In June of 1993, appellant was found at the emergency room of a Houston hospital where Efrain Perez was being treated for a gunshot wound. Testimony from an employee of the hospital regarding a conversation the employee overheard between appellant and co-defendant Cantu indicated that the two knew who had shot Perez and that they were going to go after that individual themselves. When a police officer arrived to investigate the shooting, appellant was belligerent and uncooperative.

While appellant was in jail awaiting trial on the instant offense, a search of appellant's cell turned up a "shank"[4] which had been fashioned from a disposable razor. Another search of appellant's cell a year later, the day before punishment arguments were to be heard in the instant case, turned up another "shank" in the making.

I. SUFFICIENCY OF THE EVIDENCE

Appellant asserts in his sixth point of error that the evidence was legally insufficient to support the jury's guilty verdict. In reviewing the sufficiency, of the evidence, this Court reviews all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979). Appellant concedes that sufficient evidence exists to prove his participation in the underlying

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[4] A "shank" was described as a type of homemade or jailmade knife.

offenses to the capital murder. However, appellant takes issue with the sufficiency of the evidence to prove his specific intent to commit the offense of murder. He contends the evidence supporting this intent, the testimony of Joe and Christina Cantu, was more accurately attributable to appellant's co-defendants than to appellant.

A review of the testimony of both Christina and Joe Cantu shows that they did indeed attribute many statements about the deaths of the two victims to the generic "they" encompassing the whole group. However, each witness also testified to statements attributed only to appellant. Specifically, Christina testified that appellant told her he killed the victims. In fact, she stated that appellant said that he took turns killing both of the girls.

Christina commented that appellant told her that "he took off his shoelace and strangled one of the girls."

Christina also told the jury that appellant related to her that he put his foot on one of the girl's throats, and she testified that appellant "said it would have been faster if he had a gun to kill them." When Joe Cantu was asked if he remembered specifically what appellant told him about the killing, Joe responded that appellant had told him that appellant strangled one of the victims from the back and when she didn't look like she was dead, he started stomping on her. Joe also testified that appellant commented that it would have been easier with a gun.

Given the totality of the evidence, we hold that a rational trier of fact could have found appellant guilty of the offense of capital murder beyond a reasonable doubt. Point of error number six is overruled.

In his seventh point of error, appellant posits that the evidence was insufficient to support the jury's affirmative answer to the issue on whether appellant would be a continuing danger. Article 37.071 § 2(b)(1). In reviewing whether the evidence is sufficient to support the jury's affirmative finding on the issue of future dangerousness, this Court looks at the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have believed beyond a reasonable doubt that "there is a probability that [appellant] would commit criminal acts of violence that would constitute a continuing threat to society." Article 37.071 § 2(b)(1); *Jackson v. Virginia,* 443 U.S. 307 (1979); *Allridge v. State*, 850 S.W.2d 471 (Tex. Crim. App. 1991), *cert. denied*, ___ U.S. ___, 114 S.Ct. 101 (1993). The facts of the crime alone can be sufficient to support the affirmative finding to the special issue. *Allridge, supra.* In fact, the circumstances of the crime may provide greater probative evidence of a defendant's probability for committing future acts of violence than any other factor relevant to the second special issue. *Id.*

At trial, the jury is – permitted to look at several factors in its review of future dangerousness including, but not limited to:

1. the circumstances of the capital offense, including the defendant's state of mind and whether he was acting alone or with other parties;

2. the calculated nature of the defendant's acts;

3. the forethought and deliberateness exhibited by the crime's execution;

4. the existence of a prior criminal record, and the severity of the prior crimes;

5. the defendant's age and personal circumstances at the time of the offense;

6. whether the defendant was acting under duress or the domination of another at the time of the offense;

7. psychiatric evidence; and

8. character evidence.

Barnes v. State, 876 S.W.2d 316, 322 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 174 (1994); *Keetnon v. State*, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987) ("Keeton I"). These factors are also helpful in this Court's evaluation of this question.

The facts of the instant case are brutal and barbaric enough to alone support the jury's answer to the special issue. The instant scenario began with underage drinking and fighting as a gang initiation rite. When the two victims came into the picture, appellant not only took full part in violently raping both of them and killing at least one of them, but appears to have initiated those actions.

In contrast to showing remorse afterward, appellant laughed about the incident, referred to the girls in derogatory terms, and enjoyed the spoils of the group's perceived conquest.

In addition, appellant has a history of misconduct and violent misbehavior both in school and out, with repeated suspensions, expulsions, and arrests dating back to the sixth grade. He has a history of threatening individuals with bodily harm or death and a history of being found in possession of a firearm. Before his imprisonment, appellant chose to spend his social hours with a group of young men who engaged in illegal drinking and violent behavior.

After being imprisoned, appellant continued to associate himself with weapons.

Given the totality of the evidence, we hold that a rational trier of fact could have believed beyond a reasonable doubt that "there is a probability that [appellant] would commit criminal acts of violence that would constitute a continuing threat to society," whether in prison or out. Point of error seven is overruled.

II. VOIR DIRE

Appellant complains in his third point of error that the trial court erred in granting the State's challenge for cause to venireperson R. L. Mackey pursuant to her views concerning the death penalty. The State contends the trial court did not abuse its discretion in granting the challenge for cause because the veniremember's attitude about the death penalty would have prevented or substantially impaired the performance of her duties as a juror in accordance with her oath and the instructions of the court. *See Wainwright v. Witt*, 469 U.S. 412 (1985); *Coleman v. State.*, 881 S.W.2d 344, 347-48 (Tex. Crim. App. 1994), *cert. denied*, ___U.S. ___, 115 S.Ct. 763 (1995). In reviewing such a point of error, we apply a deferential standard because the trial court was in the best position to evaluate the responses of the veniremember. *Coleman*, *supra*.

The record reveals the following pertinent exchanges:

THE COURT: Do you have any conscientious, religious, moral, or philosophical scruples against the infliction of death as punishment in an appropriate case?

[VENIREMEMBER:] No.

[THE COURT:] You said no, you don't. So do you have any opposition to the death penalty?

[VENIREMEMBER:] Religious beliefs. Thou shall not kill.

[THE COURT:] Well, you're entitled to those; and nobody is going to disagree with you.

* * *

What we don't want is someone whose beliefs are so strong that when they take an oath to follow the law and render a true verdict according to that law, that it's going to do violence to their conscience.

* * *

So, [veniremember], only you know the answer to this question. Are your religious beliefs so strong that you could not follow the oath you would have to take as a juror and render a true verdict according to the law and the evidence and if the evidence called for it, vote in such a way that it would result in the death penalty?

I know that's a mouthful. But did you understand the question? Might have been too long.

[VENIREMEMBER:] I could follow the law; but, like I say, it's just my religious belief. The law says one thing, and the religious belief says another.

[THE COURT:] Could you then participate with 11 other people in voting on these questions that we'll go over, in voting in such a way that you know would result in this defendant receiving a death sentence if the evidence called for it?

[VENIREMEMBER:] If the evidence called for it, yes.

* * *

[THE STATE:] And when you filled out your questionnaire, you stated to Question 86 – . . . that: I'm opposed to capital punishment under any circumstances.

Okay. Now, I take it, if you marked that, you had a reason for marking it, correct?

[VENIREMEMBER:] Yes, I did.

[THE STATE:] That's what you believe?

[VENIREMEMBER:] Uh-huh.

* * *

[THE STATE:] In response to . . . Question No. 12, you said: I do not believe in capital punishment under any circumstance; and you checked that "disagree."

And then in response to 89, you said you don't want to be a juror in this case because of your religious background, you don't think that you could.

[VENIREMEMBER:] Uh-huh, that's what I stated.

[THE STATE:] Followed by 90 that states: My Bible tells us thou shall not kill and this is my belief.

* * *

And if you were seated on this jury with those conflicts that you are having – I'm evidencing right now that perhaps you are having some conflict about this. Am I correct?

[VENIREMEMBER:] If – if – if – yes.

[THE STATE:] And only if I'm correct, ma'am. Certainly. Nobody is here to try to persuade you or make you participate in this. This is fully one where you have an opportunity to say: No; that if I was called upon to participate in this trial, that my belief would substantially impair me from participating and

returning a verdict of death in this case even if it was the right thing to do because of my religious belief.

Is that the way you feel?

[VENIREMEMBER:] Yes.

[THE STATE:] And you understand that I'm just a mere mortal man. I don't think I have the power of persuasion and [ability to] cloud your mind like the shadow could and get you to do my deed in light of your religious belief. And if you were selected on this jury, you would be more inclined to try to find a way, if you did end up on this jury, in some manner or form, you would try to find a way to come up with a life sentence, would you not, if you were put in that box?

[VENIREMEMBER:] That's correct.

* * *

[THE STATE:] To be a juror would substantially impair you from carrying out the law, following the law in this case, because of your religious belief?

You answered yes to that at one time.

[VENIREMEMBER:] The reason I said yes is I have just retired. And I worked with children, young adults, and I worked with young adults which have cancer. And my daughter died of cancer and that has a total thing with me for – I would say just to be in the situation like this, so I would rather not.

[THE STATE:] Well, one of the magic words, we have to have you say on the record. If it would substantially impair you from doing your duty as a juror, then you've met the qualification under the law to be discharged.

Would it substantially impair you –

[VENIREMEMBER:] Yes, it would.

Upon continued questioning by the parties and the court, the veniremember continued to express her feelings that she did not want to participate on this jury and that she would be inclined to answer the punishment questions in such a way that appellant would receive a life sentence. Given the totality of the voir dire, we cannot say that the trial court abused its discretion in sustaining the State's challenge for cause to the veniremember. *Coleman*, *Supra*; *see also Staley v. State*, 887 S.W.2d 885 (Tex. Crim. App. 1994). Point of error three is overruled.

In his fourth point of error appellant claims the trial court erred in overruling his *Batson*[5] and Article 35.261[6] challenges to the State's peremptory strike of venireperson R. Rodriguez. The record reveals that after the State exercised its peremptory strike on the venireperson, appellant

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[5] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[6] Article 35.261 prohibits the use of peremptory challenges on racial grounds. It reads in pertinent part:

> (a) After the parties have delivered their lists to the clerk under Article 35.26 of this code and before the court has impaneled the jury, the defendant may request the court to dismiss the array and call a new array in the case. The court shall grant the motion of a defendant for dismissal of the array if the court determines that the defendant is a member of an identifiable racial group, that the attorney representing the state exercised peremptory challenges for the purpose of excluding persons from the jury on the basis of their race, and that the defendant has offered evidence of relevant facts that tend to show that challenges made by the attorney representing the state were made for reasons based on race. If the defendant establishes a prima facie case, the burden then shifts to the attorney representing the state to give a racially neutral explanation for the challenges. The burden of persuasion remains with the defendant to establish purposeful discrimination.

stated, "we'll make a Batson challenge." Nowhere did appellant invoke the application of Article 35.261 or move for a dismissal of the array. Furthermore, appellant has not separately argued the protection of 35.261 in his brief. Hence, we find any complaint as to Article 35.261 has not been preserved for appellate review. *Camacho v. State*, 864 S.W.2d 524, 528 (Tex. Crim. App. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1339 (1994); Tex. R. App. Proc. 52(a).

With regard to appellant's *Batson* claim, we stated in *Satterwhite v. State*, 858 S.W.2d 412, 423 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 455 (1993):

> In order to invoke the protections set forth in *Batson*, appellant must first raise an inference of purposeful discrimination through the State's use of its peremptory strikes. Once appellant has established such purposeful discrimination, the burden of production shifts to the prosecutor to come forward with racially neutral explanations for the strikes. Once the prosecutor has articulated racially neutral explanations, the burden shifts back to the defendant to persuade the trial court that the "neutral explanation" for the strike is really a pretext for discrimination. [Citations omitted.] This Court will reverse the trial court's resolution of a *Batson* issue only if the court's findings are found to be clearly erroneous.

In the complained-of instance, appellant made a *Batson* challenge and offered the veniremember's questionnaire as evidence. He noted that the veniremember stated that he could basically look at both sides and was generally in favor of the death penalty. After noting that this was a

Batson claim and not a *Wainwright v. Witt* claim,[7] the trial court held that a prima facie case had been established. The prosecutor then gave the following race reasons for striking Rodriguez:

> My reason for striking Mr. Rodriguez is there was a great deal of hesitation with his explanation on the death penalty when he was speaking with you. He's also for the death penalty without any compulsion whatsoever if it happened to one of his relatives. I still do not have a full understanding of his position on the death penalty.
>
> With respect to the question I asked him, he gave me a philosophical – he gave a theological and Biblical and his own philosophy. One of the things put me on edge, turning the cheek, you turning the other cheek. That goes back to the philosophy if you're slapped, you turn the other cheek.
>
> I'm afraid he may be looking to turn the other cheek in this case, and I don't want it turned in my favor.

The trial court accepted these reasons as race-neutral and appellant made no attempt to rebut the explanations given or otherwise explain why they were only pretexts for discrimination. A review of the entirety of the veniremember's voir dire reveals that the prosecutor's reasons were supported by the record. Given this, we cannot say that the judge's ruling in this instance was clearly erroneous. *See Satterwhite, supra.* Point of error four is overruled.

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[7] 469 U.S. 412 (1985).

In his eighth and ninth points of error, appellant claims the trial court reversibly erred in granting school exemptions for prospective jurors M. L. Lambeth and P. S. Jolly. The August 11, 1994, voir dire of Lambeth revealed that the venireperson had recently graduated from Texas A & M University. However, she had also completed one semester of Nursing School. Furthermore, it was established that Lambeth was only on summer break and had already enrolled in and paid for nine hours of Nursing classes for the fall semester which would commence on August 29, 1994. Because her classes were scheduled to run every day of the week, and because the trial was not scheduled to begin until September 12, 1994, it was undisputed that the trial and the classes would conflict.

Tex. Gov't Code § 62.106 states that:

> A person qualified to serve as a petit juror may establish an exemption from jury service if he:
>
> * * *
>
> (4) is a person enrolled and in actual attendance at an institution of higher education[.]

Even if Lambeth was not properly excused under this section,* the judge properly excused her under Tex. Code of

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* Appellant contends that she was not properly excused pursuant to this section because she was not attending classes *at the time of voir dire*. However, we note that Gov't Code § 62.106 deals with "jury service" and not voir dire. In the instant case, the venireperson would be attending classes *at the time of "jury service."*

Appellant also contends under this point that Nursing School is a "technical" or "vocational" school and not an "institution of higher education." Given the disposition of the point of error, we need not address this contention here.

Crim. Proc. Article 35.03." *See Butler v. State,* 830 S.W.2d 125, 131-132 (Tex. Crim. App. 1992); *Harris v. State,* 784 S.W.2d 5, 18-19 (Tex. Crim. App.1989), *cert. denied,* 494 U.S. 1090 (1990).

Jolly's voir dire also established that while she was not in school at the time of her individual voir dire on August 10, 1994, she had registered and paid for college classes which she would attend, commencing August 29, 1994. Although Jolly testified that she might be able to make up the classes she would miss due to the trial, she was not sure about this and she did not want to get behind in her classwork. As with Lambeth, the trial judge excused the potential juror pursuant to Tex. Gov't Code § 62.106 as well as Tex. Code of Crim. Proc. 35.03. As with the previous point, we hold that, even if the trial court erred in excusing the veniremember pursuant to Tex. Gov't Code § 62.106, she was properly excused under Article 35.03. *See Butler, supra*; *Harris, supra.* Points of error eight and nine are overruled.

III. ADMISSION OF EVIDENCE

Appellant contends in his second point of error that the trial court erred "in admitting into evidence the appellant's written custodial statement obtained after his unlawful arrest." Appellant notes that he was arrested pursuant to an arrest warrant. However, he states

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" Article 35.03 states in pertinent part:

Sec. 1. Except as provided by Sections 2 and 3 of this article, the court shall then hear and determine excuses offered for not serving as a juror, and if the court deems the excuse sufficient, the court shall discharge the juror or postpone the juror's service to a date specified by the court.

with-out authority or analysis that the affidavit for the warrant was insufficient on its face to provide probable cause to arrest appellant. Hence, he concludes, appellant's statement was the fruit of an illegal arrest and thus should not have been admitted at trial. Appellant then proceeds to argue why the taint from the arrest was not attenuated.[10]

Appellant seems to be complaining that because the affidavit on its face did not specifically tie appellant to the two bodies found, it was insufficient to support probable cause. We disagree. It is well-settled that, in determining the sufficiency of an affidavit for an arrest or search warrant, a reviewing court is limited to the "four corners of an affidavit." *Jones v. State,* 833 S.W.2d 118, 123 (Tex. Crim. App. 1992), *cert. denied,* 507 U.S. 921 (1993). However, this determination is not meant "to place legalistic blinders on the process wherein a neutral and detached magistrate must decide whether there are sufficient facts stated to validate issuance of a proper warrant." *Id.* Rather, the warrant affidavit should be interpreted in a common sense and realistic manner and the reviewing magistrate is permitted to draw reasonable inferences from the information contained therein. *Id.*

The affidavit in the instant cause reads as follows:

> On June 28, [sic] 1993, your affiant [a homicide investigator employed by the Houston Police Department] personally went to a wooded area

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[10] Because appellant has given us nothing more than his conclusory statement that the affidavit was insufficient to show probable cause, he has inadequately briefed this point of error. Tex. R. App. Proc. 74(f). However, we have reviewed the affidavit in the interest of justice.

within the vicinity of West 34th St. and T. C. Jester in Houston, Harris County, Texas. At that location your affiant observed the bodies of two females, one of them was naked, and the other was partially unclothed and both appearing to have been dead for several days based upon the decomposition which had taken place on their bodies. The amount of decomposition which had taken place made the identification of the bodies by physical features difficult, if not impossible. The bodies were removed to the Harris County Morgue for complete autopsies and for dental analysis and comparison with the dental charts of two missing females, Jennifer Ertman and Elizabeth Pena.

Your affiant is personally aware that a report had been made to the Houston Police Department that Jennifer Ertman and Elizabeth Pena had been reported missing since June 24, 1993. Your affiant has personally read Houston Police Department report number 66830993 which was prepared by R. L. Curl of the Houston Police Department and which states that on June 25, 1993, Randy Ertman called the Department to state that his daughter, Jennifer Ertman and her friend, Elizabeth Pena were last seen walking from a friends house at approximately 11:00 P.M. on June 24, 1993 and that they said that they were going to take the short cut along the railroad tracks which are near T. C. Jester and West 34th and that they were going to go to Ertman's apartment. He reported that his daughter nor the other girl had been seen.

Your affiant is aware that an investigation had begun by the Houston Police Department in order to locate the two missing girls.

Your affiant is aware that on June 27, 1993 a man called the Houston Police Department dispatcher claiming to be Mr. Gonzalez [sic] and who told the dispatcher a possible location where the bodies of the two girls could be found. Your affiant is aware that officers of the Houston Police Department were sent to the location that "Mr. Gonzales" told them of and the officers were unable to locate their bodies.

On June 24, [sic] 1993, the same person called back claiming to be Mr. Gonzales and giving them a more specific location where the bodies could be located. He told the dispatcher that he had found the bodies himself and wanted to let the police department know. where the bodies were. On this occasion, your affiant personally went to the location as given to the dispatcher by "Mr. Gonzales" which was a wooded area near the intersection of T. C. Jester and West 34th St., Houston, Harris County, Texas. It was at this time that your affiant observed the bodies of the two girls.

Later on June 24, [sic] 1993, your affiant received information from officer Ken Weiner of the Houston Police Department Crime Stopper Division. He told your affiant that a female had called him telling him that her sister told her that her husband's, the caller's brother in law, brother had admitted to both her sister and her sister's husband that he and several other men had grabbed the two girls near the railroad tracks which run near the intersection of T. C. Jester and West 34th and that they raped and then killed the two girls. Weiner told your affiant that the caller left him her telephone number. Your affiant is personally aware that Officer Todd Miller of the Houston Police Department

Homicide Division called the telephone number and spoke with veronica Barroso who told Miller that her sister and brother in law are Christina and Joe Adam Cantu and that they live at 1128 Ashland in Houston. She further said that Christina told her that her brother in law, Peter Cantu, and Joe Madellin both admitted to both her and her husband Joe Adam Cantu that they, along with some other men, saw the two girls walking down the railroad tracks near T. C. Jester and West 34th the night of June 24, 1993 and that they all grabbed the girls, raped them and then killed them.

Based upon the aforesaid, your affiant brought Joe Adam Cantu to the offices of the Houston Police Department Homicide Division on June 28, 1993 in order to talk with him about this information. Cantu gave a sworn affidavit to [Officer] Todd Miller in which he states, under oath, that in the early morning hours of June 25, 1993, his brother, Peter Cantu, who lives with him and his wife in the house on Ashland St. came into the house along with Efrin

Perez and another man whose name he did not know. He said that Peter, Efrin, Jose Madellin and the other man started telling him about two girls that they raped and killed in the woods near the railroad tracks near West 34th and T. C. Jester. They showed him jewelry that they had taken from the girls and they admitted raping the two girls and then killing them by strangling them and leaving the bodies out in the woods. He then said that later a black male who he knows as Derrick Shawn O'Brien called his house and told him that he, too, had participated in the rapes and the murder of the two girls.

Your affiant has checked the records of the Houston Police Department and learned that Joe Adam Cantu has only one arrest for a Class C Misdemeanor ticket but that he has no other arrests and is going to school at this time and is close to graduating from the school.

As of the making of this affidavit your affiant has not learned from the Harris County Medical Examiner's Office as to the caused (sic] of death of either of the two girls. Further, your affiant is not aware that a positive identification has been made of the two bodies but, based upon all of the information that your affiant has gathered it is the opinion of your affiant that the two bodies that were found this morning are, in fact, the bodies of Jennifer Ertman and Elizabeth Pena.

Based upon the admissions which were made by the aforementioned Defendants to Cantu in which each of the men stated that they each raped the two girls and the fact that your affiant is personally aware, based upon years of experience as a Homicide investigator for the Houston Police Department, it is the opinion of your affiant that the DNA of each of the men who raped, the girls will be present in fluid samples extracted from the deceased girls during the autopsies. Further, by taking blood and saliva samples from each of the Defendants upon their arrest it will be possible for chemists to extract from those samples the known DNA of each Defendant and to then compare that with the DNA found from the autopsies of the two dead girls which will be evidence of the guilt of each defendant in these Capital Murder cases.

The affidavit contains facts which establish probable cause. In short, the affidavit states that two girls had

disappeared on June 24, 1993, and were last known to be in a specific area of Houston that evening. Pursuant to a tip received by law enforcement personnel three days subsequent to the girls' disappearance, two female bodies were discovered in the same area in which the girls were last known to be. These bodies were determined to have been deceased for several days. In calling the telephone number left by the tipster, police officers located one Joe Cantu who told them, under oath, that his brother, appellant, and some others had come to his home in the early morning hours of June 25, 1993, claiming to have just raped and killed two girls in the precise area in which the two girls had last been placed and the two female bodies had been found.

Additionally, each individual cited within the affidavit is identified by name, and some are also identified by address. The majority of the facts contained in the affidavit were told either directly to the affiant, or to other law enforcement personnel. *Earhart v. State,* 823 S.W.2d 607, 631 (Tex. Crim. App. 1991), *vacated on other grounds,* ___ U.S. ___, 113 S.Ct. 3026 (1993)[1]; *Wilkerson v. State,* 726 S.W.2d 542 (Tex. Crim. App. 1986), *cert. denied,* 480 U.S. 940 (1987). Hence, we hold that the affidavit contained sufficient information with which a detached magistrate could have found probable cause. *Id.*

Because appellant was arrested pursuant to a lawful arrest warrant, the trial court did not err in denying

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[1] *Earhart* was vacated by the United States Supreme Court and remanded to this Court in light of *Johnson v. Texas,* 509 U.S. ___, 113 S.Ct. 2658 (1993). The case was then reaffirmed by this Court. *Earhart v. State,* 877 S.W.2d 759 (Tex. Crim. App.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 431 (1994).

appellant's motion to suppress his custodial statement.[12] Point of error two is overruled.

In supplemental points of error two-(A) through two-(E), appellant claims the trial court abused its discretion in determining his custodial statement was given intentionally, knowingly, and voluntarily, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Article I, §§ 10 and 19 of the Texas Constitution; and Articles 38.22 and 38.23. Appellant briefs all of these contentions together. Appellate urges that we abandon our previous standard of reviewing voluntariness of a statement in favor of the standard set forth in *Clewis v. State,* 922 S.W.2d 126 (Tex. Crim. App. 1996). Appellant says that under this standard, we would have to conclude that the trial court abused its discretion in concluding his statement was voluntarily made.

At a hearing on a motion to suppress a defendant's statement, the trial court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Penry v. State,* 903 S.W.2d 715, 744 (Tex. Crim. App. 1995); *Romero v. State,* 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). Therefore, if the record supports the trial court's findings, we will not disturb those findings. *Id.* On appeal, we only consider whether the trial court applied the law to the facts properly. *Id.* In *Clewis,* we held that courts of appeals have jurisdiction to review questions of fact, and in reviewing factual sufficiency of the elements of the

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[12] To the extent appellant may otherwise be complaining that his statement was not voluntarily given, he has not adequately set out the issue in a separate point of error or properly briefed it. Therefore, any further claim as to appellant's statement will not be entertained here. Tex. R. App. Proc. 74(f).

offense, the court of appeals "should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." 922 S.W.2d at 134-36.

We leave for another day whether we will extend *Clewis*.[11] Even if *Clewis* were applied to the facts of this case, appellant would not be entitled to relief. After giving his written statement, appellant gave a tape recorded statement to another officer. This tape recorded statement was not admitted into evidence and appellant does not question its legality. But appellant says the recording reflects that he asked for an attorney and that this is evidence that he had wanted an attorney at the time of his written statement. While the tape is not made a part of the record on appeal, the trial court made the following findings of fact regarding the taped conversation:

> Officer C.C. Abbondandolo . . . conducted an oral, taperecorded interview with the defendant.
>
> Abbondandolo provided cigarettes to the defendant and arranged for him to be served a meal, but the defendant stated that he did not like the food and declined to eat it.
>
> Abbondandolo warned the defendant of his rights pursuant to art. 38.22, 5 2, supra, and *Miranda v. Arizona, supra*. The appellant asked if an attorney could be appointed immediately, and

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[11] *See German v. State*, No. 10-94-192-CR slip op (Tex. App.– Waco July 5, 1995) (do not publish), *reh'g denied* (Aug. 2, 1995) (do not publish) *pet. granted* (PDR No. 1036-95 granted to determine whether great weight and preponderance of evidence standard for factual sufficiency applies to trial court's ruling on mixed questions of fact and law).

> Abbondandolo responded that if he wanted an attorney at that time, they would have to terminate the interview.
>
> The defendant indicated that he desired to continue with the interview, and he voluntarily discussed the rape and murder . . .

The fact that appellant requested an attorney during his tape recorded statement does not render the trial court's conclusions as to the voluntariness of his previous written statement "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." It does not strain credibility to believe that a defendant might provide a written statement without invoking his right to an attorney, but change his mind while giving a second statement and request an attorney at that time. Appellant contends his request for an attorney during the taped conversation clearly indicates that he did not understand his rights at the time of the written statement. This, without more, does not follow. Therefore, even if a *Clewis* standard were applied here, which we expressly do not decide, appellant's claim would have no merit. Appellant's points of error two-(A) through two-(E) are overruled.

In his fifth point of error, appellant alleges the trial court erred in admitting into evidence scene and autopsy photographs of the two deceased victims because their probative value was far outweighed by their prejudicial value in violation of Tex. R. Crim. Evid. 403. Appellant recognizes that this Court has held that a photograph is generally admissible where a verbal description of the same is admissible. *Long v. State*, 823 S.W.2d 259, 270 (Tex. Crim. App. 1991), *cert. denied*, 505 U.S. 1224 (1992). But, he maintains that, in the instant case, the photographs' prejudicial value substantially outweighed any

probative value they may have had thus rendering them inadmissible. In his point of error, appellant refers to thirty-nine (39) different photographs, three (3) of which appear to be scene photographs with the remainder being autopsy photographs of the two different victims.

Of the three photographs depicting the crime scene, one shows both victims as their bodies appeared in relation to the surrounding environment. One of the remaining two photographs shows a close-up shot of one of the victims in the position in which she was found while the other photograph shows the second victim as she was found. Although these photographs are gruesome, they are highly probative in reflecting the nature and scene of the crime and the extent of some of the victims' injuries. *Barnes v. State*, 876 S.W.2d 316, 326 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 174 (1994).

With regard to the autopsy photographs, the medical examiner told the trial court that she needed all of the photographs to testify to the nature and extent of the injuries inflicted. While these photographs are also grotesque and depict extensive environmental deterioration of the subject pictured, they are probative in reflecting the nature of the crime in the context in which it occurred and the extent of some of the injuries. This visual evidence was also probative of the perpetrator's state of mind and intent during the commission of the crime due to the nature and extent of the injuries inflicted. Given the totality of the evidence, we cannot say that the trial court abused its discretion in finding that the prejudicial effect of the photographs, if any, did not outweigh their probative value. Point of error five is overruled.

Finding no reversible error, we affirm the judgment of the trial court.

MEYERS, J.

Delivered March 19, 1997
Do Not Publish
En Banc

Appeal from Harris County
No. 71,997

JOSE ERNESTO MEDELLIN,

Appellant

– v. –

THE STATE OF TEXAS,

Appellee

CONCURRING OPINION

I concur in the result as to appellant's supplemental points of error, and otherwise join the opinion of the Court. However, I would directly address the merits of appellant's supplemental points of error and make clear to the, bench and bar that Clewis v. State, 922 S.W.2d 126 (Tex.Cr.App. 1996), has no application in reviewing a trial court's determination of a motion to suppress.

McCormick, Presiding Judge

(Delivered March 19, 1997)
En Banc
Do Not Publish

Statement of Jose Ernesto Medellin,
State's Trial Exhibit 113 at 000076,
State v. Medellin, No. 675430 (339th Dist. Ct. 1994)

STATEMENT OF PERSON IN CUSTODY

Tuesday, June 29, 1993 Time: 554 Hrs.

Statement of **Jose Ernesto Medellin** taken in Harris County, Texas.

Prior to making this statement I was warned by Sgt. L.W. Hoffmaster of the Houston Police Homicide Division, the person to whom this statement was made, that:

1.) JEM I have the right to remain silent and not make any statement at all and any statement I make may and probably will be used against me at my trial;
Response: **yes sir.**

2.) JEM Any statement I make may be used as evidence against me in court; Response: **yes.**

3.) JEM I have the right to have a lawyer present to advise me prior to and during any questioning;
Response: **yes sir.**

4.) JEM If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning and;
Response: **yes sir.**

5.) JEM I have the right to terminate, or stop, this interview at any time.
Response: **yes sir.**

6.) JEM Prior to and during the making of this statement I knowingly, intelligently and voluntarily waived, or gave up, the rights set out above and made the following voluntary statement:
Response: **yes sir.** JEM

My name is Jose Ernesto Medellin. I am 18 years old years old. I was born in Laredo Mexico on 3/4/75. I last went to school at Eisenhower High School and have a total of 8 years of formal education.

On Thursday June 24th, 1993, around 8:30 or 9:00PM in the evening, I went to the Brook Green apartments with Raual (doesn't know last name), Peter Cantu, my little brother Venancio Medellin Jr., Efrain Perez, Frank Sandaval and his brother Roman Sandaval. Another friend Sean Derrick Obrien, lives in the Brook Green Apartments. I went to Sean's Apartment and told him that we were going to initiate Raual into our gang. Sean and I went to the parkinglot to go meet the others. Then we went to the railroad tracks behind the Brook Green Apartments and crossed over to the grass area on the banks of the bayou. Peter told Sean to take him, meaning to fight Raual, Raual's initiation was going to be to fight all of us. Sean said no I can't see, it's too dark. Sean has vision problems.

JOSE E. MEDELLIN
Signature

Witnesses:

SGT. G. J. NOVAK	6-29-93	7:23 AM
M. E. DOYLE	6-29-93	7:23 AM

Page 2 of Custodial Statement of Jose Ernesto Medellin.

Me and Peter were talking to Sean about it. We called Roman Sandoval to where we were and told Roman to take him. Roman said no man he's a little bit to big for me. Then we told Roman that if we were to get into a fight out on the street he wouldn't be able to say that. Roman said

fuck it, I'll take him. Roman went up to Raual and started fighting with him. They stopped fighting and Sean said fuck it, I'll whip his ass to. Then Sean started fighting with Raual. They stopped fighting and Peter said I'll take him. I told Peter no you are the leader I'll take him. I fought Raual and then we stopped. Then Peter said you take him Junior, meaning Efrain Perez and they started fighting. When they stopped Peter told Raual that if he could stand up for more than ten seconds, he was in. Then we went back to the tracks in the middle of the railroad bridge and we were drinking up there. We were talking and drinking and we said fuck it lets find something else for him to do.

We were walking back to the parking lot and as we were walking down the tracks a girl passed by us. When Peter saw the second girl, he said kick his ass Junior to Efrain Perez. Peter thought the hispanic girl was a boy. We started talking to the two girls, they told us their names were Jenifer and Elizabeth and that they had to go home.

Peter grabbed Jenifer and said bitch your going to come over here. Peter told Raual to grab the other one. The were saying let us go please and Peter said bitch were going to fuck your ass. Elizabeth said don't hurt me I'll let you do it. I was with Peter and Elizabeth and Sean, Raual and Efrain were with Jenifer. Peter was having sex with Elizabeth, then Peter ask her for her phone number and she gave him a number, 686-3267. Then Peter ask her why don't you suck my friends dick, meaning me, and she said yes. Then she did it. Elizabeth told me to hurray up that she had to go home. She ask Peter you're going to let us go right and he said yes.

While this was going on Raual, Sean and Efrain were taking turns having sex with Jenifer.

Then Peter called Raual and me over to where he was. Peter told my little brother to get all their stuff, beepers, watch, rings and necklaces. Then we took them to the woods and Efrain began having sex with Elizabeth in the woods and Sean with Jenifer. Then Peter told Raual to kill Jenifer, Sean handed Raual a belt and said do it with this. Raual strangled Jenifer with the belt. The belt tore and Jenifer fell to the ground and Peter told Raual to use his foot, to put his foot on her throat and step on it. Then Raual did that. Peter told Efrain to do the same thing to Elizabeth but to use his shoe lace. Efrain couldn't get a good grip so he told me to hold one end of the shoe lace. Then Efrain got a better grip on the shoe lace and took it

JOSE E. MEDELLIN
Signature

Witnesses:

SGT. G. J. NOVAK	6-29-93	7:23 AM
M. E. DOYLE	6-29-93	7:23 AM

Page 3 of Custodial Statement of Jose Ernesto Medellin.

back and continued to choke Elizabeth. Efrain let go and she was still moving and Peter told him to step on her throat and Efrain did that.

As all of this was going on, my little brother walked by and Peter told me to tell him to leave, so that he wouldn't see it but they had already started killing the girls.

As we were leaving Raual said I don't think this bitch is dead, he was talking about Jenifer. Raual started

stomping on Jenifer's face with his foot. Then he started doing the same thing to Elizabeth. Then we left.

Raual kept some of the jewelry and I threw one of the beepers in the bayou and Peter threw the other beeper in the bayou. Then we went home. The Mickey Mouse Watch that my little brother Venancio had belonged to one of the girls, I don't know which one.

I have read this, my statement, consisting of 3 page/pages, and finished reading it at 7:23 Hrs.

JOSE E. MEDELLIN
Signature

Witnesses:

SGT. G. J. NOVAK	Pr# 39034	Date:	6-29-93
M. E. DOYLE	Pr# 40900	Time:	07:23 Hrs.

End of statement of Jose Ernesto Medellin.

Affidavit of Manuel Perez Cardenas, the Consul General of Mexico, filed in support of state post-conviction application for a writ of habeas corpus; Ex parte Medellin, No. 675430-A (339th Dist. Ct. 2001); No. 50,191-01 (Tex. Crim. App. 2001).

AFFIDAVIT OF MANUEL PEREZ-CARDENAS

STATE OF TEXAS §

COUNTY OF HARRIS §

My name is Manuel Perez Cardenas, Consul General of Mexico in Houston, Texas. My current address is 1440 Westoffice Drive, Houston Texas 77042. I am above the age of eighteen (18) years and am competent in all respects to make this oath. I am personally acquainted with the facts herein stated.

I am the Consul General of Mexico in Houston, Texas. One of the duties of the Mexican Consulate in Houston is to advise any Mexican National who, having been arrested or detained for some crime committed here, exercises his right under Article 36 of the Vienna Convention on Consular Relations of 1963, to contact the Mexican Consulate for help in responding to the fact of his detention, dealing with the arresting authority, and arranging for representation for local legal counsel. When Jose Ernesto Medellin was arrested for capital murder in Harris County he was not advised of his right to contact with his Consulate, the Mexican Consulate was not timely informed. Had the Mexican Consulate been informed of Jose Ernesto Medellin arrest, an officer of the Consulate would have contacted him immediately to explain to him the full significance and importance of his right under Miranda Warning included to have legal counsel present to serve as an intermediary between himself and the

police in the custodial setting (particularly in a capital charge). Had the Mexican Consulate been timely informed of Jose Ernesto Medellin's arrest, an officer of the Consulate would have immediately arranged to have legal counsel present during any custodial interrogation. Finally, had the Mexican Consulate been told Jose Ernesto Medellin's detention, the Consulate representative would have strongly advised him that he had a right not to speak to the police except on the advice and in the presence of his legal counsel, and that it would be in his best interest not to speak to the police unless and until his lawyer might advise that he do so. "Nothing included in this document shall be construed or interpreted as a waiver of the immunities, privileges and rights of Consul General Manuel Perez Cardenas, established by the Vienna Convent on Consular Relations, the US-Mexico Consular Convention of 1942, and international law".

MANUEL PEREZ-CARDENAS
Manuel Perez-Cardenas
Consul General of Mexico in Houston

SIGNED under oath before me on March 24, 1998

[NOTARY STAMP]
LISA MILSTEIN
Notary Public, State of Texas
My Commission Expires
04-15-2001

LISA MILSTEIN
NOTARY PUBLIC, State of Texas

IN THE 339TH DISTRICT COURT OF
HARRIS COUNTY, TEXAS

Cause No. 675430-A

EX PARTE

JOSE ERNESTO MEDELLIN,

Applicant

RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court, having considered the applicant's application for writ of habeas corpus, the Respondent's Original Answer, the evidence elicited at the applicant's capital murder trial in cause no. 675430, affidavits submitted in cause no. 675430-A, and official court documents and records, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The applicant, Jose Ernesto Medellin, was indicted and convicted of the felony offense of capital murder in cause no. 675430 in the 339th District Court of Harris County, Texas.

2. The applicant was represented during trial by counsel Jack Millin, now deceased, and Linda Mazzagatti.

3. On September 20, 1994, the trial court assessed the applicant's punishment at death by lethal injection

after the jury affirmatively answered the first two special issues and negatively answered the third special issue.

4. The Court of Criminal Appeals affirmed the applicant's conviction in an unpublished opinion delivered March 19, 1997. *Medellin v. State,* No. 71,997 (Tex. Crim. App. Mar. 19, 1997) (not designated for publication).

First Ground – ineffective assistance of appellate counsel re Batson claim: Fourth Ground – Batson claim:

5. The Court finds that, during the State's voir dire examination of prospective juror Elizabeth Ann Berry, she stated that both of her brothers had been arrested for drug-related offenses; that both have had a "number of cases;" that one was "serving time now;" that they had been in and out of the prison system often in the last five or six years; and, that the cases were prosecuted in Harris County (R. XX – 181-2).

6. The Court finds that, on the juror questionnaire, prospective juror Elizabeth Berry described a defense attorney as the underdog, always fighting, and a prosecutor as "on the attack" (R. XX – 184).

7. The Court finds that the State exercised a peremptory strike at the conclusion of the voir dire examination of prospective juror Elizabeth Berry, and the applicant made a *Batson* challenge (R. XX – 226).

8. The Court finds that the trial court requested that the State, "regardless of a prima facie showing," offer an explanation for the strike of prospective juror Elizabeth Berry, and that the State explained that the strike was based upon Berry having two brothers involved in drugs and serving time in prison; that one brother had been in

prison on numerous occasions; and, that one brother was presently on parole and the other brother was presently in custody (R. XX – 227-8).

9. The Court finds that the State, in explaining its strike of prospective juror Elizabeth Berry, noted Berry's characterization of the prosecution as on the attack and the defense as the underdog and stated that, as a result, the State would have the perception during the trial that Berry viewed the applicant as the underdog and the prosecutor as a "wild mongrel" on the attack (R. XX – 228).

10. The Court finds that the State, via prosecutor Mark Vinson, stated that he had an appreciation of blacks serving on juries, because he was a black male who grew up during the 1940's, 50's, 60's, 70's, 80's, and 90's (R. XX – 229).

11. The Court finds that the trial court stated that it did not believe that a *prima facie* showing had been made at that time, but the trial court found that the State's reasons for striking prospective juror Elizabeth Berry were race-neutral based on Berry's demeanor and her responses and her juror questionnaire (R. XX – 230).

12. The trial court denied the applicant's *Batson* motion and informed the applicant that the court would reconsider the motion if the applicant wanted to reurge it at the end of jury selection (R. XX – 230).

13. The Court finds that the trial court noted, after denying the applicant's *Batson* challenge, that the jury was then composed of nine people, including a black female, a black male, an Hispanic male, and an Hispanic female; that there was no indication of gender bias; and, that the jury composition at that time was a black female,

two white females, an Hispanic female, an Hispanic male, two white males, and a black male (R. XX – 230-1).

14. The Court finds that, during the State's voir dire examination of prospective juror Rafael F. Rodriguez, the State noted that there was hesitation on Rodriguez's part regarding the death penalty when questioned by the trial court and Rodriguez stated that he had not given the death penalty much thought (R. XXI – 71).

15. The Court finds that, during the State's voir dire examination of prospective juror Rafael Rodriguez, his responses concerning his thoughts on the death penalty were unclear and ambiguous (R. XXI – 90, 92-6).

16. The Court finds that, at the conclusion of the voir dire of prospective juror Rafael Rodriguez, the State exercised a peremptory strike on Rodriguez and the applicant made a *Batson* challenge, noting that the applicant and Rodriguez are both Hispanic (R. XXI – 115-6).

17. The Court finds that, at the conclusion of the State's voir dire of prospective juror Rafael Rodriguez and after the applicant's *Batson* challenge, the trial court made a finding of a *prima facie* case, and the State gave the following explanations for the peremptory strike of Rodriguez: that he had a great deal of hesitation when he was talking about the death penalty with the trial court; that the State still did not have a full understanding of Rodriguez's position on the death penalty; and, that Rodriguez had stated that he was absolutely in favor of the death penalty without any compunctions if the victim were a relative of Rodriguez (R. XXI – 117).

18. The Court finds that the State also noted that prospective juror Rafael Rodriguez's theological and

philosophical reply during voir dire examination concerning "turning the other cheek" indicated that Rodriguez would be "looking to turn the other cheek in this case . . . " (R. XXI – 118).

19. The Court finds that the trial court found that the State's explanation for the peremptory strike of prospective juror Rafael Rodriguez was a racially neutral explanation and the trial court denied the applicant's *Batson* challenge (R. XXI – 118).

20. The Court finds that the applicant, on August 17, 1994, presented a written motion to strike the jury panel based, in part, on the State's exercising thirteen preemptory strikes against the following prospective jurors, as noted by the applicant: (1) Kirven O'Neal Tillis, black male; (2) Mary Freeman, white female; (3) Kathy Felder, black female; (4) Bernard Richardson, black male; (5) Walter Wynn Martin, white male; (6) Andra McCoy, black male; (7) Marie Clark, white female; (8) Vastine Dickie, black male; (9) Christine Rossi, white female; (10) Raford Earl Gresham, white male; (11) Porfirio Rodriguez, Jr., Hispanic male; (12) Elizabeth Ann Berry, black female; and (13) Rafael Rodriguez, Hispanic male (R. I – 264-5) (R. XXVI – 11).

21. The Court finds that, on August 17, 1994, the applicant presented the following argument in support of its motion:

> And the State exercised six of it's (sic) peremptory challenges against black venire members and eight of it's (sic) peremptory challenges against males and the State exercised two of it's (sic) peremptory challenges against Hispanic male venire members. And this also includes a Batson Challenge. And, of course, the

> Court – I agree that whatever Batson challenges were preserved during the proper objection at the time would be the Batson Challenges that would be considered. But we are bringing to the Court's attention that these persons have been struck and that we would suggest to the Court that it's a prima facie case of discrimination for the State's use of peremptory challenges and we would suggest to the Court that the motion – that our Motion to Strike the Panel be also granted on this premise.

(R. XXVI – 11-2).

22. The Court finds that the State, in response to the applicant's August 17, 1994 argument in support of the applicant's motion to strike the panel, informed the trial court that the record reflected that the final jury was a "melting jury" and that the thirteen noted peremptory strikes were racially neutral (R. XXVI – 12-3).

23. The Court finds that the trial court denied the applicant's motion to strike the jury panel by written order on August 19, 1994 (R. I – 267).

24. The Court finds that the State exercised thirteen peremptory strikes and that a review of the State's peremptory strikes, as noted in the applicant's motion to strike the jury panel, shows that the State struck three white females and two white males, comprising almost fifty percent of the State's thirteen total peremptory strikes (R. I – 264-5) (R. XXVI – 11-2).

25. The Court finds, based on personal recollection, that the prosecutor in the applicant's case was also the prosecutor in the 1993 Harris County capital murder trial of Kenneth Wayne Morris; that the trial judge in the applicant's case and the trial judge in Kenneth Wayne

Morris' case was the same person; that the prosecutor offered an explanation for a peremptory strike during jury selection in Kenneth Wayne Morris' case; that the trial judge found the prosecutor's explanation to be racially neutral in Kenneth Wayne Morris' case; and, that the trial judge noted in Kenneth Wayne Morris' case that the same prosecutor had tried a capital case three months earlier and that there were either three or four black jurors. *See Volume 4, page 115, appellate record of The State of Texas v. Kenneth Wayne Morris, cause no. 597997.*

26. The Court finds that the Court of Criminal Appeals, on direct appeal of the capital murder conviction of Kenneth Wayne Morris, overruled Morris' claim that the trial court improperly based her ruling on the absence of purposeful discrimination by the same prosecutor in another criminal trial and stated, "A ruling on a *Batson* objection is a credibility determination. Because the trial judge determines the issue of the prosecutor's credibility, it is not error for the court to consider its past experiences with a prosecutor in determining his credibility." *Morris v. State*, 940 S.W.2d 610, 612 (Tex. Crim. App. 1996).

First Ground – ineffective assistance of appellate counsel re Motion to Preclude State from Seeking Death Penalty:

27. The Court finds that the applicant, prior to trial, filed a written motion to preclude the State from seeking the death penalty and that the clerk's file-mark on the face of the motion notes that the motion was filed at 2:00 p.m. on July 29, 1994 (R. I – 95-107).

28. The Court finds that the face of the applicant's written motion to preclude the State from seeking the death penalty shows the following stamp:

> On The Record
> Date: 9/9/94
> Ct. Reporter: Wong Lee

(R. I – 108).

29. The Court finds that the written order accompanying the applicant's motion to preclude the State from seeking the death penalty is signed by the Honorable Caprice Cosper, the presiding judge of the 339th District Court and that there are initials placed on the line next to "GRANTED" (R. I – 108).

30. The Court finds, based on the appellate record, that the trial court ruled on pre-trial motions and verbally denied the applicant's objection to preclude the State from seeking the death penalty (R. XXVII – 9).

31. The Court finds, based on its personal recollection, that the written order notation on the applicant's motion to preclude the State from seeking the death penalty is an inadvertent error.

32. The Court finds that the applicant's written motion to preclude the State from seeking the death penalty and its accompanying order were a request for the trial court to preclude the State from seeking the death penalty, not a motion requesting that the State be precluded from carrying out a constitutionally valid death sentence after such sentence is assessed.

33. The Court further finds, based on the applicant's trial in which the State sought the death penalty and on

the applicant's resulting death sentence, that the inadvertent error on the written order accompanying the applicant's motion to preclude the State from seeking the death penalty was rendered moot by the applicant's trial and subsequent sentence of death.

Second Ground – ineffective assistance of counsel re contacting probation officer:

34. The Court finds that evidence was presented during the guilt-innocence phase of the applicant's trial showing that the applicant and his co-defendants, Peter Cantu, Efrain Perez, Derrick Sean O'Brien, and Raul Villarreal, took turns sexually assaulting the complainant and Jennifer Ertman (R. XXXII – 948-9); that the applicant participated in the strangulation deaths of the complainant and Ertman after the repeated sexual assaults (R. XXXII – 949); that the applicant afterwards laughed and bragged about his part in the sexual assaults and murders (R. XXIX – 389-90); that the applicant said that he "fucked one of the girls in the pussy" and then "fucked her in the ass;" (R. XXIX – 391-2); that the applicant said that he made one of the girls give him a "blow job" and that he hit her on the top of her head when she would not close her mouth (R. XXIX – 395, 425); and, that the applicant later showed Christina Cantu his underwear with blood on it and stated that he could not believe that one of the girls was telling the truth when she said that she was a virgin; that the applicant, who admitted having sex with both girls, seemed proud that he "opened" the girl who was a virgin, and that he "dirtied" the inside of the girl when he was first entering her; that the applicant said they had fun; and, that the applicant took part of the

property stolen from the murdered girls (R. XXIX – 393-4, 397-401, 405, 422, 424-5) (R. XXX – 477-8, 533-4).

35. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant was suspended from school at the age of fourteen in 1990; that he was placed in an alternative school for repeated misbehavior and misconduct; and, that he was not able to function at the alternative school and was expelled from the school district for the remainder of the school year (R. XXXIV – 76-8).

36. The Court finds that, during the punishment phase of the applicant's trial, the State further presented evidence that the applicant called a female teacher a whore, used profanity and defied the rules (R. XXXIV – 7-13).

37. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant made threats of physical violence toward two adult principals when the applicant was a sixteen-year old student in 1992; that he was confrontational, aggressive, and physically resisted the principals when they attempted to calm the applicant; that he screamed profanities at another student; and, that the applicant stated that life did not mean anything to him; he would be on television or in the newspaper for killing someone and jail did not scare him (R. XXXIV – 17-64).

38. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant had been suspended several times from school by 1992; that he was expelled from school after being in a gang-related fight; and, that the applicant never

altered his behavior while attending school before he was permanently removed (R. XXXIV – 64-9).

39. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant was referred as a juvenile on a weapons charge after he was detained as a result of an auto theft and after he was found in possession of a .38 revolver on January 4, 1992 (R. XXIV – 110-54), and that the applicant was charged with the offense of carrying a weapon on July 18, 1992, after a .38 weapon was found partially under the applicant's car seat on the floorboard of the car next to two live rounds of .38 SP ammunition, a more powerful round than a normal .38 round (R. XXXIV – 179-81)

40. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the police talked to the applicant outside of the emergency room at Memorial Northwest Hospital after the applicant and Peter Cantu accompanied the gunshot Efrain Perez to the hospital on June 6, 1993; that the applicant and Cantu were uncooperative, belligerent, abusive, sarcastic and vulgar; and, that the applicant changed his story concerning the shooting several times (R. XXXIV – 197, 216-8).

41. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that a shank was found during a search of the applicant's one-man cell in the Harris County Jail on July 1, 1993 (R. XXXIV – 84-90), and that an L-shaped metal pipe, capable of causing serious bodily injury and death, with a sharpened end was also found in the mattress in the applicant's lock-down cell (R. XXXIV – 225-7).

42. The Court finds, based on the appellate record, that information, if any, that the applicant was punctual for appointments with his juvenile probation officer and did not cause his probation officer any problems is inconsequential in light of the overwhelming evidence of the applicant's prior history and in light of the brutality of the offense which the applicant committed.

43. The Court finds, based on the appellate record, that information, if any, that the applicant presented no problems for his probation officer does not establish that the applicant does well when supervised and does not establish that such evidence is indicative of the applicant's expected behavior in prison if he received a life sentence, in light of the extensive evidence showing the applicant's repeated illegal activities and inability to function in structured environments, including jail.

Second Ground – ineffective assistance of counsel re parole eligibility instruction:

44. The Court finds that, during the applicant's trial, trial counsel stated that counsel did not want the trial court to inform the jury of the applicant's parole eligibility in the event of a life sentence because counsel's previous experience in capital cases showed that polled jurors thought that a life sentence was truly a life sentence (R. V. XXVII – 12-3).

45. The Court finds that the issue of parole eligibility was not a matter for the jury's consideration at the time of the applicant's September, 1994 capital murder trial, and the trial court was not required to instruct the jury concerning parole eligibility in a capital case. *Martinez v. State*, 924 S.W.2d 693 (Tex. Crim. App. 1996);

Rhoades v. State, 934 S.W.2d 113 (Tex. Crim. App. 1996) (citing *Smith v. State*, 898 S.W.2d 838, 846 (Tex. Crim. App. 1995)).

Third Ground – Vienna Convention:

46. The Court finds that the applicant did not object pre-trial or during trial to any violation of the Vienna Convention on Consular Relations which grants a foreign national who has been arrested, imprisoned or taken into custody a right to contact his consulate and requires the arresting government authorities to inform the individual of this right "without delay." Vienna Convention, art. 36(1)(b), 21 U.S.T. at 100-101; 595 U.N.T.S. at 292.

47. The Court finds that testimony during the applicant's trial and the applicant's statement reflect that the applicant was born in Mexico, but lived most of his life in the United States; that he spoke, read and wrote the English language; that he attended Houston public schools beginning with elementary school; that he initially did well in elementary school; that his family and friends lived in the United States; that his father had been gainfully employed since his arrival in the United States; that his mother was presently employed; and that the applicant had been employed in the United States while going to Houston schools (R. XXXV – 279-92) (R. XXX – 652, 670).

48. The Court finds that the applicant's father testified that they had lived in the United States for fifteen years and that both he and the applicant's mother had a "green card" (R. XXXV – 279-80, 288).

49. The Court finds that the applicant's school records contain the notation "516396627" under social security number for the applicant.

50. The Court finds, based on the appellate record, that there was no testimony presented during the applicant's trial that he was not a United States citizen; that the applicant told anyone during his detention that he was a Mexican national; that he requested assistance from the Mexican consulate; or, that he was prevented from requesting assistance from the Mexican consulate.

51. The Court finds that it is a reasonable inference that the applicant was familiar with the laws and procedures of the country and state in which he had lived almost his entire life and that the applicant was familiar with the criminal justice system based on his prior criminal history.

52. The Court finds that the applicant was informed of his *Miranda* rights prior to giving a statement admitting participation in the offense (R. XXX – 633-40) (R. XXXII – 942-5).

53. The Court finds that the Court of Criminal Appeals has held that a defendant does not have standing to advance a claim that his death sentence violated the United Nations Charter, stating that " . . . treaties operate as contracts among nations. Therefore, it is the offended nation, not an individual, that must seek redress for a violation of sovereign interests." *Hinojosa v. State,* No. 72,932 (Tex. Crim. App. Oct. 27, 1999).

54. The Court finds that the Court of Criminal Appeals has also held that treaties do not constitute "laws" for the purposes of TEX. CODE CRIM. PROC. art. 38.23;

specifically, that "the Vienna Convention Treaty illustrates well the proposition that Article 38.23 is not a suitable enforcement mechanism for international treaties." *Rocha v. State*, 16 S.W.3d 1, 19 (Tex. Crim. App. 2000).

55. The Court finds that federal courts have found that a violation of the provisions of the Vienna Convention will not require reversal of a criminal conviction or other judgment, in the absence of a showing that the defendant was actually harmed by the violation. *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 487 (1997); *United States v. $69,530.00 in United States Currency*, 22 F.Supp.2d 593, 595 (W.D.Tex. 1998).

Fifth Ground – Brady issue:

56. The Court finds that, during the guilt-innocence phase of the applicant's trial, the State presented testimony from Joe Cantu, the brother of the applicant's co-defendant Peter Cantu, and from Christina Cantu, Joe Cantu's wife, about the admissions the applicant made concerning his part in the capital murder (R. XXIX – 366-373, 383-425) (R. XXX – 490-540).

57. The Court finds, according to the credible affidavit of Gail Hays, Harris County District Attorney's Office Investigator, that Hays was assigned as an investigator to the 263rd District Court during 1994; that Assistant District Attorney Marie Munier was the chief of the 263rd District Court and was the prosecutor in the trial of the applicant's co-defendant Efrain Perez at that time; that Hays talked with witnesses Christina and Joe Cantu; that Hays made no deals or agreements with Christina and Joe Cantu in exchange for their cooperation or testimony as

witnesses; that Hays did not promise the Cantus any reward money in exchange for their cooperation or testimony; and, that Hays did not promise "protection" to either Christina or Joe Cantu.

58. The Court further finds, according to the credible affidavit of Gail Hays, that Hays was aware that Christina Cantu was pregnant, but Hays was not aware of any miscarriage and was never informed of any alleged beating of Christina Cantu; that Hays became aware that Joe Cantu had been arrested prior to trial when Christina Cantu telephoned Hays and gave her such information; that Hays' understanding was that Joe Cantu made a statement about "blowing up" his place of employment after having an argument at work and Joe Cantu was subsequently arrested; that Hays informed Assistant District Attorney Marie Munier of Joe Cantu's arrest either the night Hays learned he had been arrested or the next business day; that Hays had no knowledge of any events concerning Joe Cantu's arrest after that time; that Hays did not recommend a lawyer or give any lawyer's name to either Joe or Christina Cantu; that Hays made no promises concerning Joe Cantu's case; and, that Hays was not aware of the disposition of Joe Cantu's arrest until December, 1999.

59. The Court finds, according to the credible affidavit of Harris County Assistant District Attorney Marie Munier, the prosecutor in the case of the applicant's co-defendant Efrain Perez, that Munier learned that Joe Cantu had been arrested prior to trial; that Munier has no specific recollection of informing Assistant District Attorneys Mark Vinson or Terry Wilson of Joe Cantu's arrest; that Munier made no deals or agreements with Joe or Christina Cantu involving their testimony in the trials or

involving Joe Cantu's arrest; that Munier took no action involving Joe Cantu's arrest or the disposition of his case; that Munier was aware that Joe Cantu's case was dismissed prior to the trials of the applicant and co-defendant Efrain Perez; that Munier made no promises or assurances to either Joe or Christina Cantu concerning any reward money in exchange for their cooperation or testimony; Munier was aware that Christina Cantu was pregnant, but Munier was not aware of any miscarriage; and, that Munier was never told of any alleged beating of Christina Cantu.

60. The Court finds, according to the credible affidavit of Harris County Assistant District Attorney Mark Vinson, the prosecutor in the applicant's capital murder trial, that, Vinson did not make any deals or agreements with Joe or Christina Cantu involving their testimony in the trials; that Vinson did not promise or assure either Joe or Christina Cantu that they would receive any reward money in exchange for their cooperation and testimony; that Vinson has no specific recollection of being aware of either Joe Cantu's 1994 arrest for a misdemeanor offense or the disposition of Joe Cantu's case; that Vinson had nothing to do with the disposition of Joe Cantu's case; that Vinson has a slight recollection of being aware that Christina Cantu was pregnant, but he was never aware of any miscarriage; and, that Vinson was never told of any alleged beating of Christina Cantu.

61. The Court finds, based on official court records, that a complaint against Joe Cantu for the misdemeanor offense of terroristic threat, cause no. 9425339, Harris County Court at Law # 13, was dismissed on August 4, 1994, based on insufficient evidence; that trial testimony began in the applicant's case on September 12, 1994 (R.

XXVIII – 34); and, that Joe Cantu testified in the applicant's case on September 14, 1994 (R. XXX – 490-577). *See attached complaint and motion to dismiss, cause no. 9425339.*

62. The Court finds, based on the credible affidavit of Harris County Assistant District Attorney Joni Vollman, that Vollman was the chief prosecutor in Harris County Court at Law #13 in August, 1994; that Vollman signed the motion to dismiss contained in the clerk's file in the State of Texas v. Joe Cantu, cause no. 9425339, in which Cantu was charged with the misdemeanor offense of terroristic threat; that Vollman has no specific recollection as to the facts of the case in cause no. 9425339; that Vollman had some awareness that Joe Cantu was related to the defendant Peter Cantu, one of the defendant's in Elizabeth Pena and Jennifer Ertman's murders; that Vollman's vague awareness about this relationship did not influence Vollman's dismissal of the charges against Joe Cantu in cause no. 9425339; that Vollman would have specifically remembered if anyone in the Harris County District Attorney's Office had approached her, requesting, suggesting, or ordering that charges be dismissed against Joe Cantu; that Vollman states with certainty that she has no such recollection; and, that the charges against Joe Cantu in cause no. 9425339 were dismissed based on insufficient evidence. *See attached March 1, 2000 affidavit of Joni Vollman.*

CONCLUSIONS OF LAW

First Ground – ineffective assistance of appellate counsel re Batson claim: Fourth Ground - Batson issue:

1. The trial court properly found that the State's explanations that the State exercised a peremptory strike

against prospective juror Elizabeth Berry based on her two brother's criminal history, including one of the brother's being on parole and the other brother being incarcerated, and based on Berry's perception of the applicant being the underdog and the prosecutor being the attacker were racially neutral explanations logically related to the instant case. *See Harris v. State*, 827 S.W.2d 945, 955 (Tex. Crim. App. 1992) (holding that prosecutor's explanation in capital case that he struck venireperson because her brother was on probation for burglary was racially neutral).

2. The trial court properly found that the State's explanation that the State struck prospective juror Rafael Rodriguez, in part, because the State still did not have a full understanding of Rodriguez's position on the death penalty is supported by the ambiguity of Rodriguez's cited voir dire statements about the death penalty, and the State's explanation that the State feared that Rodriguez believed in "turning the other cheek" was a racially neutral explanation which does not violate the precepts of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986); *see Cantu v. State*, 842 S.W.2d 667, 688-9 (Tex. Crim. App. 1992) (holding that trial court's finding that prosecutor's reasons for striking prospective juror were racially neutral where prosecutor stated that strike was based, in part, on prospective juror's volunteer work indicating that she would be "kind-hearted"); *see also Lewis v. State*, 911 S.W.2d 1, 4 (Tex. Crim. App. 1995) (holding that prosecutor could exercise peremptory strikes against two prospective jurors who were not in favor of death penalty as long as strikes not made in racially discriminatory manner).

3. The applicant, in his written motion to strike the jury panel, fails to establish a *prima facie* case of

purposeful discrimination in the State's peremptory strikes. *Harris*, 827 S.W.2d at 955 (holding that defendant, in order to establish *prima facie* case, may rely on fact that peremptories constitute jury selection practice that allows those to discriminate who are of mind to discriminate, and defendant must show this fact and other relevant circumstances raise inference that peremptories were exercised to exclude prospective jurors on basis of race).

4. In the alternative, the trial court properly found that the State's explanations for striking specific jurors were racially neutral. *Wheatfall v. State*, 882 S.W.2d 829, 835 (Tex. Crim. App. 1994) (holding State has burden to present neutral explanation for strike); *see also Trevino v. State*, 864 S.W.2d 499, 500 (Tex. Crim. App. 1993) (holding State's explanation for strike does not have to rise to level needed to justify challenge for cause).

5. The applicant fails to show that the trial court's decision that the State's strikes were racially neutral was clearly erroneous. *Id.* (holding appellate court may not reverse trial court's decision that State's strike is racially neutral unless trial court's decision is clearly erroneous and trial court's choice of interpretation may not be found to be clearly erroneous when evidence is susceptible to two reasonable interpretations and trial court's decision is in accord with one of these two interpretations).

6. The applicant fails to show that the trial court erred in allegedly failing to grant a *Batson* hearing, and the applicant fails to show that his rights under the equal protection clause, U.S. CONST. amend. XIV, were violated.

7. The applicant fails to show that appellate counsel is ineffective for not presenting on direct appeal the claim that the trial court allegedly erred in finding that the

State gave race neutral reasons for peremptory strikes and in allegedly not granting a *Batson* hearing. The applicant fails to show that, but for appellate counsel's alleged error, the results of the proceeding would have been different. *Ex parte Butler,* 884 S.W.2d 782, 783 (Tex. Crim. App. 1994) (holding that *Strickland* standard applies to appellate counsel as well as trial counsel).

First Ground – ineffective assistance of appellate counsel re Motion to Preclude State from Seeking Death Penalty:

8. The applicant fails to show that appellate counsel is ineffective for not advancing the meritless claim that the trial court allegedly erred in orally denying the applicant's Motion to Preclude State from Seeking the Death Penalty when the trial court allegedly granted the same written motion. *See Butler,* 884 S.W.2d at 783; *see also Kinnamon v. State,* 791 S.W.2d 84, 97 (Tex. Crim. App. 1990) (counsel not ineffective for failing to request jury charge on lesser-included of murder when the evidence did not support such charge).

Second Ground – ineffective assistance of counsel re contacting probation officer:

9. The applicant fails to show deficient performance, much less harm, in trial counsel's not contacting probation officer Guerra and not presenting punishment evidence that the applicant was allegedly punctual for appointments with his probation officer and that the applicant allegedly presented no problems for his probation officer, in light of the overwhelming evidence of the brutality of the applicant's crime, the applicant's past illegal activities, and the applicant's inability to function in the structured

environments of school and jail. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984).

Second Ground – ineffective assistance of counsel re parole eligibility instruction:

10. The trial court properly did not instruct the jury as to parole eligibility and defense counsel properly did not voir dire on the issue of parole eligibility. *See Martinez v. State,* 924 S.W.2d 693 (Tex. Crim. App. 1996) (holding issue of parole eligibility not a matter for jury's consideration in capital murder trial); *Rhoades v. State,* 934 S.W.2d 113 (Tex. Crim. App. 1996) (citing *Smith v. State,* 898 S.W.2d 838, 846 (Tex. Crim. App. 1995)).

11. Trial counsel are not ineffective for making the reasonable, strategic decision, based on prior experience, not to request that the jury be informed and instructed concerning parole eligibility, an instruction which would make the jury aware that the eighteen-year old applicant would be eligible for parole at the relatively young age of forty-three. *Ex parte Ewing,* 570 S.W.2d 941 (Tex. Crim. App. 1978) (appellate court will review trial strategy only when it is without a plausible basis).

12. The applicant fails to show deficient performance, much less harm, based on trial counsels' reasonable trial strategy of not informing the jury concerning parole eligibility; thus, the applicant fails to show that his rights, pursuant to U.S. CONST. Amends. VI and XIV, were violated.

Third Ground – Vienna Convention:

13. Based on the applicant's lack of objection at trial to the alleged failure to inform him of his rights under the

Vienna Convention, the applicant is procedurally barred from presenting his habeas claim that the alleged violation of the Vienna Convention violated his constitutional rights. *Hodge v. State,* 631 S.W.2d 754, 757 (Tex. Crim. App. 1982); *Williams v. State,* 549 S.W.2d 183, 187 (Tex. Crim. App. 1977).

14. In the alternative, the applicant fails to show foreign nationality which requires notification of a foreign consulate when a "national" of the "sending state" is detained in custody. *See Maldonado v. State,* 998 S.W.2d 239, 246-7 (Tex. Crim. App. 1999) (holding that defendant not entitled to art. 38.23 instruction where defendant not informed of his right to consult consulate but evidence showed that defendant lived in United States many years, spoke English, had Texas driver's license, and bought car in United States and evidence did not show that defendant was a Mexican citizen).

15. In the alternative, the applicant, as a private individual, lacks standing to enforce the provisions of the Vienna Convention. *Hinojosa v. State,* No. 72,932 (Tex. Crim. App. Oct. 27, 1999) (holding that treaties operate as contracts among nations; thus, offended nation, not individual, must seek redress for violation of sovereign interests).

16. In the alternative, the applicant fails to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; the applicant was provided with effective legal representation upon the applicant's request; and, the applicant's constitutional rights were safeguarded. *See and cf. Rocha v. State,* 16 S.W.3d 1, 19 (Tex. Crim. App. 2000) (holding that treaties do not constitute "laws" for purpose of TEX.

CODE CRIM. PROC. art. 38.23, and Vienna Convention Treaty illustrates proposition that art. 38.23 is not suitable enforcement mechanism for international treaties).

17. The applicant fails to show that his rights, pursuant to U.S. CONST. amends. V, VI, and XIV, were violated and fails to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. *Ex paste Barber,* 879 S.W.2d 889, 891-92 (Tex. Crim. App. 1994) (holding that, in order to be entitled to habeas relief, defendant must plead and prove that complained-of error did, in fact, contribute to his conviction or punishment).

Fifth Ground – Brady issue:

18. The applicant fails to show that there was any deal between the State and Joe and Christina Cantu; thus, the applicant fails to show that the State did not disclose material evidence, i.e., a non-existent agreement between Joe and Christina Cantu in exchange for their testimony during the applicant's trial. The applicant fails to show that the State did not disclose a non-existent agreement or any alleged favorable and material information in the instant case. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392 (1976); *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375 (1985) (holding evidence is material where there is a reasonable probability that, if disclosed, result of the proceeding would have been different). The applicant fails to show that he was denied due process under U.S. CONST. amend. XIV and TEX. CONST. art. 1, § 10.

19. The applicant fails to demonstrate that his conviction was unlawfully obtained. Accordingly, it is

recommended to the Texas Court of Criminal Appeals that relief be denied.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 675430-A.

Signed this 22nd day of January, 2001.

CAPRICE COSPER

CAPRICE COSPER
Presiding Judge
339th District Court

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. 50,191-01

EX PARTE JOSE ERNESTO MEDELLIN

HABEAS CORPUS APPLICATION
FROM HARRIS COUNTY

The order was entered per curiam.

ORDER

This is an application for writ of habeas corpus filed pursuant to the provisions of Art. 11.071, V.A.C.C.P.

On September 16, 1994, a jury found applicant guilty of capital murder. The jury returned answers to the punishment phase special issues and the trial court assessed punishment at death. This Court affirmed applicant's conviction on direct appeal. Medellin v. State. No. 71,977 (Tex.Cr.App. delivered March 19, 1997).

In the instant cause, applicant presents five allegations challenging the validity of his conviction and resulting sentence. The trial court has entered findings of facts and conclusions of law recommending the relief sought be denied.

This Court has reviewed the record. The trial court's findings and conclusions are supported by the record and

upon such basis the relief sought by the applicant is denied.

IT IT SO ORDERED THIS 3RD DAY OF OCTOBER, 2001.

Do Not Publish

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-01-4078

JOSE ERNESTO MEDELLIN,

Petitioner,

– v. –

JANIE COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

ORDER

Petitioner Jose Ernesto Medellin ("Medellin") filed a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his capital conviction and death sentence. (Docket Entry # 12). Pending before the Court is Respondent Janie Cockrell's ("Respondent") motion for summary judgment. (Docket Entry # 16). Having considered the record, the pleadings, and the applicable law, particularly the application of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), the Court **grants** respondent's motion for summary judgment, **denies** Medellin's petition, and **denies** a Certificate of Appealability.

BACKGROUND

On September 23, 1993, a Texas grand jury indicted Medellin for his role in the capital murder of Elizabeth Pena. The evidence in the guilt/innocence phase of trial showed that on June 24, 1993, Medellin and his fellow gang members raped and killed sixteen-year-old Elizabeth Pena and her fourteen-year-old friend, Jennifer Ertman. The evidence at trial, briefly summarized, showed that, after participating in a gang initiation, Medellin and other gang members encountered the victims walking along railroad tracks at approximately 11:30 p.m. Over the next hour, the gang repeatedly and viciously raped the two girls. The testimony at trial established that Medellin participated in the rape of both victims. The gang members then strangled the two girls to death. Trial testimony established that Medellin helped strangle Elizabeth Pena with one of his shoestrings. In describing the attacks later, Medellin appeared "hyper, giggling and laughing" as he recounted his role. Medellin also bragged about deflowering one of the young girls. The only remorse Medellin showed was that he did not have a gun so that the killing would have been quicker.[1]

The jury found Medellin guilty of capital murder.[2] In a separate punishment phase, the State presented evidence

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[1] Medellin confessed to his participation in the rape and murder of the two girls. Medellin's confession portrays a more limited involvement in the crimes than he bragged about immediately after the killings. Medellin's confession, however, indicates that he participated in the rape of Elizabeth Pena and then helped another gang member strangle her.

[2] The State indicted Medellin under three different theories: capital murder of Elizabeth Pena in the course of a kidnaping; capital murder of Elizabeth Pena in the course of a robbery; and capital murder of Elizabeth Pena in the course of aggravated sexual assault. Tr. Vol. I at 6. The jury instructions provided for his conviction under any of those theories. Tr. Vol. I at 285-86. The jury returned a general verdict of guilty without specifying under which theory it convicted Medellin. Tr. Vol. I at 294.

of Medellin's violent character and criminal offenses. Medellin had a long history of violent threats and misbehavior, often associated with the possession of firearms. The State also presented evidence that Medellin had been discovered with a "shank" in his cell while incarcerated pending trial. The defense's punishment phase case focused on testimony that Medellin had a good character and on an expert's opinion that he would not be a future danger to society. The jury answered Texas' special issues in a manner requiring the imposition of a death sentence.

The Court of Criminal Appeals denied Medellin's direct appeal from his conviction and sentence on March 19, 1997. *Medellin v. State*, No. 71, 997 (Tex. Crim. App. Mar. 19, 1997) (unpublished). Medellin did not seek *certiorari* review in the United States Supreme Court.

Medellin filed a state application for habeas corpus relief. The trial habeas court held that no controverted, previously unresolved issues existed and found it unnecessary to hold an evidentiary hearing. State Habeas Record at 177.[3] On January 22, 2001, the trial court signed the State's proposed findings and conclusions recommending that habeas relief be denied. State Habeas Record at 198-218. The Court of Criminal Appeals found that the record supported the lower court's findings and conclusions and, on that basis, denied relief. *Ex parte Medellin*, No. 50, 191-01 (Tex. Crim. App. Oct. 3, 2001).

On November 28, 2001, Medellin filed a preliminary federal petition for a writ of habeas corpus through appointed counsel. (Docket Entry # 5). On July 18, 2002,

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[3] Judge Caprice Cosper presided over Medellin's trial and his state habeas proceedings.

Medellin amended his habeas petition. (Docket Entry # 12). Medellin's amended petition raises five grounds for habeas relief:

1. Medellin's Sixth Amendment right to effective assistance of counsel was violated by trial counsel's[4] failure to present evidence of his good behavior while on juvenile probation, trial counsel's failure to present evidence of the parole eligibility accompanying a life sentence, and appellate counsel's[5] failure to seek enforcement of a trial court order allegedly precluding the State from seeking a death sentence;

2. The State violated Medellin's rights under the Vienna Convention by not protecting his right to consular access;

3. The State violated the Fourteenth Amendment by exercising its peremptory challenges in a discriminatory manner;

4. The State failed to disclose material exculpatory information to the defense; and

5. The trial court denied Medellin an impartial jury by excluding a potential juror for her opposition to capital punishment.

Respondent seeks summary judgment on the merits of Medellin's claims. (Docket Entry # 16). Medellin has filed a response to the summary judgment motion. (Docket Entry # 24).

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[4] Jack Millin and Linda Mazzagatti represented Medellin at trial. For the sake of clarity, the Court will generally refer to these attorneys conjunctively as "trial counsel."

[5] Randy McDonald represented Medellin on appeal. This Court will refer to him as "appellate counsel."

STANDARDS OF REVIEW

Respondent seeks summary judgment in this case. In ordinary civil cases, summary judgment is appropriate if "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." FED. R. Civ. P. 56(c); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747 (5th Cir. 1996). A petition for writ of habeas corpus is a civil action in federal court. *See Archer v. Lynaugh*, 821 F.2d 1094, 1096 (5th Cir. 1987). "As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000). However, "[t]he Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules." *Woodford v. Garceau*, ___ U.S. ___, 123 S. Ct. 1398, 1402 (2003); *see also* Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts. In habeas proceedings, a court's summary judgment review is circumscribed by the AEDPA. *See Proctor v. Cockrell*, 283 F.3d 726, 729-30 (5th Cir. 2002).

The intent of the AEDPA is "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002); *see also Woodford* ___ U.S. at ___, 123 S. Ct. at 1401 ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases."). The AEDPA "embodies the principles of federalism, comity, and finality of judgments," *Evans v. Cockrell*, 285 F.3d 370, 374 (5th Cir. 2002), "substantially restrict[ing] the scope of federal review of state criminal court proceedings." *Montoya v.*

Johnson, 226 F.3d 399,404 (5th Cir. 2000), *cert. denied*, 532 U.S. 1067 (2001); *see also Woodford v. Visciotti*, ___ U.S. ___, 123 S. Ct. 357, 360 (2002) ("[Section] 2254(d)'s highly deferential standard for evaluating state-court rulings . . . demands that state court decisions be given the benefit of the doubt."). In essence, the "AEDPA was enacted, at least in part, to ensure comity, finality, and deference to state court habeas determinations by limiting the scope of collateral review and raising the standard for federal habeas relief." *Robertson v. Cockrell*, 324 F.3d 297, 306 (5th Cir. 2003).

The AEDPA provides that a federal habeas petition shall not be granted with respect to any claim adjudicated on the merits in state court unless the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d)(1)-(2). Deference under the AEDPA differs depending on whether the state court engaged in a legal, factual, or mixed inquiry. *See Gachot v. Stalder*, 298 F.3d 414, 417-18 (5th Cir. 2002).

Federal courts analyze questions of law and mixed questions of law and fact under 28 U.S.C. § 2254(d)(1) to determine whether the state court decision was either "contrary to" or an "unreasonable application" of Supreme Court precedent. *See DiLosa v. Cain*, 279 F.3d 259, 262 (5th Cir. 2002); *Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885 (2001). The Supreme Court

holds that a state court decision is "contrary to" federal precedent if: (1) the state court's conclusion is "opposite to that reached by [the Supreme Court] on a question of law" or (2) "the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000); *see also Bell*, 535 U.S. at 698; *Early v. Packer*, ___ U.S. ___, 123 S. Ct. 362, 365 (2002). A state court may unreasonably apply federal law if it "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the particular facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407.[6]

A federal habeas court's review under 28 U.S.C. § 2254(d) "should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002), *cert. denied*, ___ U.S. ___, 123 S. Ct. 963 (2003). In reviewing the state court's substantive decision under the AEDPA,

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[6] An unreasonable application of federal law "is different from an *incorrect* application of federal law." *Id.* at 410. To provide relief, a federal habeas court must not only conclude that "the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411; *see also Woodford*, ___ U.S. at ___, 123 S. Ct. at 361 (differentiating between an incorrect state determination and an "unreasonable application of federal law"); *Valdez v. Cockrell*, 274 F.3d 941, 947 (5th Cir. 2001) ("Thus, a state court application may be incorrect in our independent judgment and, yet, reasonable."), *cert. denied*, ___ U.S. ___, 123 S. Ct. 106 (2002).

this court focuses on "'determining the reasonableness of the state court's 'decision,' . . . not grading their papers.'" *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir. 2001) (quoting *Cruz v. Miller,* 255 F.3d 77, 86 (2d Cr. 2001)), *cert. denied,* 535 U.S. 982 (2002); *cf. Dillard v. Blackburn,* 780 F.2d 509, 513 (5th Cir. 1986) (observing that "federal courts do not sit as courts of appeal and error for state court convictions"). Thus, this Court bases its analysis on "the state court's ultimate conclusion, not on its reasoning process." *DiLosa*, 279 F.3d at 262; *Neal,* 286 F.3d at 246.

The AEDPA affords deference to a state court's resolution of factual issues. Under 28 U.S.C. § 2254(d)(2) "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding[.]" *Miller-El v. Cockrell,* ___ U.S. ___, 123 S. Ct. 1029, 1043 (2003). A federal habeas court must presume the underlying factual determinations of the state court to be correct, unless the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Miller-El,* ___ U.S. at ___, 123 S. Ct. At 1036.[7]

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[7] The AEDPA also established strict standards limiting the availability of evidentiary hearings in federal court. *See* 28 U.S.C. § 2254(e)(2). Medellin requests a hearing but has not shown that such a hearing is necessary to the adjudication of his claims. As the availability of an evidentiary hearing is within the discretion of this Court, *see Williams v. Taylor,* 529 U.S. 420, 436 (2000) (stating that it was "Congress' intent to avoid unneeded evidentiary hearings in federal habeas corpus"), Rule 8 of the Rules Governing Section 2254 Cases ("If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require."), this Court holds that there is no need for an evidentiary hearing in this case.

Notwithstanding a petitioner's ability to show that a state court decision is erroneous under 28 U.S.C. § 2254(d), that does not guarantee that a petitioner is entitled to habeas relief. The language of 28 U.S.C. § 2254(d) "does not *require* federal habeas courts to grant relief reflexively." *Robertson*, 324 F. 3d at 306; *see also Aleman v. Sternes*, 320 F.3d 687, 690-91 (7th Cir. 2003) (finding that 28 U.S.C. § 2254(d) does not entitle a petitioner to habeas relief). No Supreme Court case "ha[s] suggested that a writ of habeas corpus should automatically issue if a petitioner satisfies the AEDPA standard[.]" *Horn v. Banks*, 536 U.S. 266, 272 (5th Cir. 2002). A habeas corpus petitioner meeting his burden under 28 U.S.C. § 2254(d) must still comply with 28 U.S.C. § 2254(a): he must show that "he is in custody in violation of the Constitution or law and treaties of the United States." This includes a showing that any constitutional error at trial "had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Robertson*, 324 F.3d at 304 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)); *see also Aleman*, 320 F.3d at 690 ("Nothing in the AEDPA suggests that it is appropriate to issue writs of habeas corpus even though any error of federal law that may have occurred did not affect the outcome"). Habeas relief is also unavailable if it would require the creation of a new constitutional rule. *See Horn*, ___ U.S. at ___, 122 S. Ct. at 2151 (relying on *Teague v. Lane*, 489 U.S. 288 (1989)).

ANALYSIS OF THE CASE

I. Effective Assistance of Counsel

Medellin raises three claims criticizing his trial and appellate legal representation. Medellin first argues that

trial counsel's representation in the punishment phase fell below constitutional norms when counsel failed to present evidence of his good probation history. Also, Medellin faults trial counsel for not alerting the jury to the fact that he would not be eligible for parole for at least thirty-five years if given a life sentence. Medellin finally faults appellate counsel for not seeking enforcement of an apparently erroneous order precluding the State from seeking the death penalty. The Texas courts rejected each of those claims. This Court will consider their merits under the relevant legal standards.

A. *Strickland standard*

The proper standard for evaluating the effectiveness of counsel is reasonable performance under prevailing professional norms. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984). In *Strickland*, the Supreme Court established a two-prong test for resolving ineffective assistance claims. Under that test, a defendant must show that counsel's performance was deficient and prejudicial to the defense. *Id.* at 687. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700. Both the performance and prejudice components of the ineffective assistance of counsel inquiry are mixed questions of law and fact. *See Motley v. Collins*, 18 F.3d 1223, 1226 (5th Cir.), *cert. denied*, 513 U.S. 960 (1994).

To establish deficient performance, the petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In reviewing ineffectiveness claims "judicial scrutiny of

counsel's performance must be highly deferential," and every effort must be made to eliminate "the distorting effect of hindsight." *Id.* at 689.

A petitioner must also show that counsel's deficient performance resulted in a reasonable probability of a different result. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *See id.* However, "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993). Thus, in addition to establishing a reasonable probability of a different result, a petitioner must demonstrate that counsel's deficient performance rendered the result of the proceeding fundamentally unfair or unreliable. *See Vuong v. Scott,* 62 F.3d 673, 685 (5th Cir.) (citing *Lockhart,* 506 U.S. at 372), *cert. denied,* 516 U.S. 1005 (1995).

The burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is on the petitioner. *See Montoya,* 226 F.3d at 408; *Jernigan v. Collins,* 980 F.2d 292, 296 (5th Cir. 1992), *cert. denied,* 508 U.S. 978 (1993). A petitioner's conclusory and speculative allegations will not suffice in this regard. *See Kinnamon v. Scott,* 40 F.3d 731, 734-35 (5th Cir.), *cert. denied,* 513 U.S. 1054 (1994); *Barnard v. Collins,* 958 F.2d 634, 643 n.11 (5th Cir. 1992), *cert. denied,* 506 U.S. 1057 (1993). The Fifth Circuit has cautioned that

> [a] claim of ineffective assistance of counsel must be judged with eyes directly upon the reality of the situation facing defense counsel at the time of the acts and not years later. This discipline best assures faithful application of the objective measure of whether the decisions of defense

> counsel are within the range of those a reasonably competent lawyer might have made under those same facts and circumstances. It also takes us far along in judging its prejudice, if that inquiry is required.

Black v. Cockrell, 314 F.3d 752, 754-55 (5th Cir. 2002), *cert. denied*, ___ U.S. ___, ___ S. Ct. ___, 2003 WL 1235155 (April 21, 2003).[*] The Court will apply the above-stated standards to Medellin's ineffective-assistance-of-counsel claims.

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[*] The Fifth Circuit's language echos [sic] the *Strickland* decision:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.
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> * * *
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> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct . . . The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. . . . [T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. at 689-90; *see also Williams v. Collins*, 16 F.3d 626, 631 (5th Cir.), *cert. denied*, 512 U.S. 1289 (1994).

B. *Failure to present evidence of good behavior while on juvenile probation*

During the punishment phase, trial counsel called several witnesses to present testimony that would support a life sentence. These witnesses included former employers, friends, and family members. Medellin also called a psychologist whose testimony suggested that Medellin would not be a future danger to society. Medellin now argues that trial counsel provided ineffective assistance by not calling his former juvenile probation officer as a witness. Medellin contends that trial counsel should have presented his probation officer's testimony to show that he would not be a danger when placed under supervision, thus encouraging the jury to answer the special issues in a manner favoring a life sentence.

Medellin fails to support this claim with competent evidence. Claims of uncalled witnesses are not favored on habeas review because they are "largely speculative." *Evans,* 285 F.3d at 377. A petitioner raising such claims generally leaves a court to speculate on the exact nature of an uncalled witness' putative testimony. Here, Medellin has failed to provide this Court with any reliable indication of what testimony Medellin's former probation officer would have given if called as a witness. Medellin relies on an affidavit from his state habeas investigator stating that his probation officer, Maria Guerra, told her that Medellin "came on time" and that she "never had a problem" with him. (Docket Entry # 12, Exhibit F). Essentially, Ms. Guerra allegedly told the investigator that Medellin "did what he was supposed to do." (Docket Entry # 12, Exhibit F). What Medellin's former probation officer allegedly told his habeas investigator is hearsay, and Medellin has not shown that it falls under any exception to the hearsay

rule. *Cf.* FED R. EVID. 802; *see also Herrera v. Collins,* 506 U.S. 390, 417-18 (1993) (holding on the facts of the case that affidavits containing hearsay statements obtained eight years after the habeas petitioner's trial were not sufficient to grant habeas relief). Absent the hearsay statements in his investigator's affidavit, this Court is left with nothing but speculation concerning what a former probation officer may have added to Medellin's defense. This claim could be rejected on that basis alone.

Even assuming that the hearsay statements are reliable, Medellin fails to show an entitlement to habeas relief. The state habeas court issued several factual findings commenting on the potential impact of the putative evidence:

> 42. The Court finds, based on the appellate record, that information, if any, that the applicant was punctual for appointments with his juvenile probation officer and did not cause his probation officer any problems is inconsequential in light of the overwhelming evidence of the applicant's prior history and in light of the brutality of the offense which the applicant committed.
>
> 43. The Court finds, based on the appellate record, that information, if any, that the applicant presented no problems for his probation officer does not establish that the applicant does well when supervised and does not establish that such evidence is indicative of the applicant's behavior in prison if he received a life sentence, in light of the extensive evidence showing the applicant's repeated illegal activities and inability to function in structured environments, including jail.

State Habeas Record at 207, ¶¶42, 43. The state habeas court concluded that the absence of the probation evidence did not meet either prong of the *Strickland* analysis. State Habeas Record at 215, ¶9. That decision was neither contrary to, nor an unreasonable application of, federal law.

Trial evidence portrayed Medellin as an extremely violent and depraved individual. The State presented extensive evidence that Medellin consistently broke the law, often in a violent manner. Medellin participated in the brutal gang rape and murder of two young girls. As noted by the Court of Criminal Appeals on direct review, "[t]he facts of the case are brutal and barbaric enough to alone support the jury's answer to the [future dangerous] special issue." Opinion on Direct Review ("Opinion") at 7. The mere fact that Medellin was prompt at his probation appointments and never caused his probation officer problems would not overcome the substantial, nearly overwhelming, evidence of his future dangerousness.

The punishment phase evidence rebuts Medellin's insistence that the probation officer's testimony could have shown that he would not be a threat in a structured environment. The State presented evidence that, while incarcerated pending trial, Medellin secreted weapons in his cell. Medellin's own actions refute any inference that he would not be violent in prison. In light of the depraved nature of the offense, his highly violent character, and his poor behavior while incarcerated, the fact that Medellin was not tardy at his probation meetings does not create a reasonable probability that the jury would not find him to be a future danger. The state court's decision was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). This claim is denied.

C. *Failure to emphasize the parole eligibility accompanying a life sentence*

Medellin also faults counsel for not making the jury aware, either through voir dire questioning or through a jury instruction, that Texas law provided for parole only after thirty-five years incarceration if the jury returned a life sentence. The trial court indicated to the defense that it would be willing to allow parole eligibility information to come before the jury. Tr. Vol. 27 at 12. Trial counsel Ms. Mazzagatti told that court that her co-counsel Mr. Millin

> has already articulated to the Court his reasons for not wanting to pursue the basis of informing the jurors of the 35 years because he had previously, based on his experience in six other capital murder trials, polled jurors and found that they believe that it was truly a life sentence. And so he thought as a strategy he would not proceed with the advising people on the 35 years.

Tr. Vol. 27 at 12-13. Medellin now argues that trial counsel's failure to present evidence of parole eligibility meets both prongs of the *Strickland* analysis.

The state habeas court held that trial counsel made a strategic decision not to inform the jury about parole eligibility. The state habeas court concluded that "[t]rial counsel are not ineffective for making the reasonable, strategic decision, based on prior experience, not to request that the jury be informed and instructed concerning parole eligibility, an instruction which would make the jury aware that the eighteen-year old applicant would be eligible for parole at the relatively young age of

forty-three." State Habeas Record at 215-16, ¶ 11.[9] The state habeas court's decision was not contrary to, or an unreasonable application of, federal law.

Trial counsel apparently hoped to leave the jury with the impression that a life sentence meant just that – lifelong incarceration. The integrity of trial counsel's choice is reflected in concerns raised by the Fifth Circuit in other cases: that a jury's knowledge that the defendant could one day return to society may "'predispose[] them to impose a death penalty.'" *Woods v. Johnson*, 75 F.3d 1017, 1037 (5th Cir.) (quoting *King v. Lynaugh*, 850 F.2d 1055, 1060 (5th Cir. 1988)), *cert. denied*, 519 U.S. 854 (1996). Indeed, as noted by the Fifth Circuit in another case, the petitioner's

> crime, and his revelry in it, leave no room for hypothesizing that a jury, faced with the information about parole for which [the petitioner] contends, would have been more lenient. If anything, given the egregious nature of this case, a suggestion to prospective jurors that [the petitioner] might return to society in [thirty-five] years could very easily have predisposed them to impose a death sentence.

King, 850 F.2d at 1061. This concern is amplified in this case due to Medellin's youth at the time of the murders. Trial counsel made a choice not to risk the chance that a jury would not view thirty-five years as an appropriate

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[9] The Court notes that the state habeas court erred in its mathematical computation of at what age Medellin would be eligible for parole. Nonetheless, the same principle applies whether Medellin would be released in his forties or his fifties – he could still commit a violent crime.

amount of time before parole, and thus return a death sentence.

The Supreme Court has recognized that "[i]n a State in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury of information regarding parole." *Simmons v. South Carolina*, 512 U.S. 154, 168 (1994). Trial counsel based his decision not to inform the jury of parole eligibility on his prior experience and on objectively defensible strategy. As Medellin failed to show that the state habeas court's decision was contrary to or an unreasonable application of federal law, this claim is denied. *See* 28 U.S.C. § 2254(d)(1).[10]

D. *Failure to seek enforcement on appeal of the trial court's order allegedly precluding the State from seeking a death sentence*

Prior to trial, Medellin filed a "Motion to Preclude Prosecution from Seeking the Death Penalty." Tr. Vol. I at 95-107. Medellin's motion argued that Texas should not be permitted to seek the death penalty against him because

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[10] The state habeas court also found that Medellin failed to show that he was prejudiced by trial counsel's failure to offer evidence or question about parole eligibility. State Habeas Record at 216, ¶ 12. Medellin's response to the summary judgment motion relies on studies showing that a jury's correct knowledge of parole eligibility increases the likelihood of them imposing a life sentence. Considering the overwhelming evidence that supported a death sentence in this case, and the brutal nature of the murders, there is no reasonable probability that a jury would return a life sentence had it known about the lengthy time before Medellin would be eligible for parole.

of various perceived deficiencies in the capital sentencing statute. On September 9, 1994, the trial court held a hearing to address various pre-trial motions. There, the following interchange occurred:

> Trial counsel: Your Honor, could we start with the Motion to Declare the Texas Capital Sentencing Scheme Unconstitutional and Motion to Preclude the Imposition of the Death Penalty because these will probably be –
>
> Trial court: That will be denied. All right. What else?
>
> Trial counsel: Then the next one, Your Honor, will be the Motion to Preclude the Prosecution from Seeking the Death Penalty.
>
> Trial court: That will be denied.

Tr. Vol. 27 at 9. When the trial court signed the defense's proposed order that day, however, the trial judge initialed the line indicating that the motion to preclude the death penalty had been granted. Tr. Vol. I at 108. Neither trial nor appellate counsel seized on the written order as an opportunity to avoid a capital conviction.

Medellin argues that the written order of the trial court was enforceable and should have prevented his capital prosecution. Medellin faults his appellate counsel for not identifying the existence of the challenged order in the record. Medellin contends that appellate counsel rendered ineffective assistance by not asking the Court of Criminal Appeals to vacate his death sentence because the trial court initialed the portion of his written order that would prevent his capital prosecution, even when the trial

court clearly evinced on the record the intent to deny the motion.

Medellin raised this claim on state habeas review. There, the same court which presided over his trial issued the following factual finding: "The Court finds, based on its personal recollection, that the written order notation on the applicant's motion to preclude the State from seeking the death penalty is an inadvertent error." State Habeas Record at 204, ¶ 31.[11] On that basis, the court denied habeas relief. State Habeas Record at 215, ¶ 8. This conclusion is neither contrary to, nor an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

The state habeas court explicitly found its notation on the written order was inadvertent. This Court must presume that finding to be correct unless Medellin shows clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1). Medellin has not produced any evidence that would suggest that the trial court intended to prevent the State from seeking a death sentence. The record itself, most particularly the interchange where the trial court orally denied the motion, supports the conclusion that the written order reflects an inadvertent error. Nothing would indicate that the trial court meant to prevent the State from seeking a death sentence.

An appellate attorney cannot be faulted for not raising meritless claims. *See United States v. Kimler*, 167 F.3d 889,

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[11] The trial court actually found "based on the applicant's trial in which the State sought the death penalty and on the applicant's resulting death sentence, that the inadvertent error on the written order accompanying the applicant's motion to preclude the State from seeking the death penalty was rendered moot by the applicant's trial and subsequent sentence of death." State Habeas Record at 204, ¶ 33.

893 (5th Cir. 1999) ("An attorney's failure to raise a meritless argument thus cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue."); *Williams v. Collins,* 16 F.3d 626, 634 (5th Cir.), *cert. denied*, 512 U.S. 1289 (1994). "Failure to raise meritless objections is not ineffective lawyering; it is the very opposite." *Clark v. Collins,* 19 F.3d 959, 966 (5th Cir.), *cert. denied*, 513 U.S. 966 (1994); *see also Green v. Johnson,* 160 F.3d 1029, 1037 (5th Cir. 1998) ("[F]ailure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness . . . "), *cert. denied*, 525 U.S. 1174 (1999). The trial court obviously made an inadvertent mistake in signing the order upon which Medellin now relies. Appellate counsel had no chance of crafting that into a viable, meritorious appellate argument. The state habeas court's rejection of this claim was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). This claim is denied.

II. Vienna Convention

Medellin is a citizen of Mexico. Medellin contends that he was never given consular access before, during, or after his trial. Medellin maintains that this denial of consular assistance violated his rights under the Vienna Convention on the Law of Treaties, May 22, 1969, art. 31(1), 8 I.L.M. 4 (1969) ("Vienna Convention"). Because of this denial, Medellin asks this Court to order that a new trial be held.

Medellin presented this claim on state habeas review. The state habeas court held that Medellin failed to object

to the violation of the Vienna Convention at trial. On that basis, the state habeas court concluded that his failure to properly preserve the claim waived his right to assert the claim on post-conviction review. State Habeas Record at 210, ¶ 13.[15] Respondent argues that the state habeas court's reliance on an independent and adequate state procedural rule, *i.e.*, Texas' contemporaneous objection rule, bars federal consideration of Medellin's Vienna Convention claim.

The Fifth Circuit "has consistently held that the Texas contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review of a petitioner's claims." *Fisher v. State*, 169 F.3d 295, 300 (5th Cir. 1999); *see also Sharp v. Johnson*, 107 F.3d 282, 285-86 (5th Cir. 1997); *Nichols v. Scott*, 69 F.3d 1255, 1280 n.48 (5th Cir. 1995), *cert. denied*, 518 U.S. 1022 (1996); *Amos v. Scott*, 61 F.3d 333, 345 (5th Cir.), *cert. denied*, 516 U.S. 1005 (1995). Medellin, however, argues that Vienna Convention claims are exempt from the constrains of the procedural default doctrine.

In *Breard v. Greene*, 523 U.S. 371 (1998), the Supreme Court considered the effect of the procedural default doctrine on a prisoner's Vienna Convention claim. Recognizing that federal courts "should give respectful consideration to the interpretation of an international treaty

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[15] The state habeas court also considered the merits of Petitioner's Vienna Convention claim. A state court's alternative adjudication of a claim on the merits does not vitiate the validity of its procedural bar. *See Corwin v. Johnson*, 150 F.3d 467, 473 (5th Cir.) ("It is clear in this Circuit that alternative rulings do not operate to vitiate the validity of a procedural bar that constitutes the primary holding."), *cert. denied*, 525 U.S. 1049 (1998).

rendered by an international court," the Supreme Court nonetheless found that, "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* at 375.[13] The Supreme Court held that the procedural default doctrine could bar consideration of a Vienna Convention claim. *See id.* at 375-76. The Supreme Court supported this finding by recognizing that the procedural default doctrine applied is even to claims brought under the United States Constitution – a document "'on full parity with a treaty.'" *Id.* ay [sic] 376 (quoting *Reid v. Covert,* 354 U.S. 1, 8 (1957)). The Supreme Court also expressed doubt that any Vienna Convention claim could be successful absent "some showing that the violation had an effect on the trial." *Breard,* 523 U.S. at 377 (citing *Arizona v. Fulminate,* [sic] 499 U.S. 279 (1991)). The *Breard* decision would allow Medellin's failure to comply with Texas' contemporaneous objection rule to bar federal review of this claim.

Medellin, however, argues that a case decided in the International Court of Justice ("ICJ") abrogates reliance on a procedural bar in rejecting Vienna Convention claims. In the *LaGrand Case (Germany v. United States),* 2001 I.C.J. 104, the ICJ found that the procedural default rule itself did not violate the Vienna Convention. *See LaGrand*

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[13] The Supreme Court noted that "[t]his proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention 'shall be exercised in conformity with the laws and regulations of the receiving State,' provided that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.'" *Breard,* 523 U.S. at 375 (quoting Article 36 2), [1970] 21 U.S. T., at 101])

Case, 2001 I.C.J. 104, at ¶ 90.[14] The ICJ, however, condemned the application of the procedural default rule when "it prevent[ed] 'full effect [from being] given to the purposes for which the rights accorded under [the Vienna Convention] are intended." *Id.* at ¶ 91. The ICJ held that, because of "the failure of the American authorities to comply with their obligation" under the Vienna Convention, "the procedural default rule prevented [LaGrand] from attaching any legal significance" to the State's violation of the Vienna Convention. *Id.* According to Medellin, the effect of the *LaGrand Case* is that "procedural default rules may not be invoked to deny merits-based review of [a Vienna Convention] violation." (Docket Entry # 24 at 21).

Medellin forfeited consideration of his Vienna Convention claim by failing to comply with an adequate and independent state procedural rule. The Supreme Court has long held that such procedural rules bar federal consideration of defaulted claims, except under narrow exceptions. Medellin's reliance on the *LaGrand Case* would create a wholesale exception to procedural limitations when a petitioner raises Vienna Convention claims – potentially invalidating well-settled law such as the AEDPA's insistence on the exhaustion of remedies and the timely presentation of claims. The concerns of comity, federalism, and finality of state judgements suggest that this Court refrain from jettisoning the procedural bar doctrine until the Supreme Court reconciles its caselaw

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[14] The ICJ previously entered an order requiring the United States to ensure that LaGrand was not executed. Arizona executed LaGrand in 1999. The ICJ did not enter its final judgment in the *LaGrand Case* until 2001.

with the ICJ action in the *LaGrand Case*. This Court is simply wary of finding that the ICJ overruled entrenched Supreme Court precedent.[15]

Even if this Court were to consider the merits of the claim, Medellin is not entitled to federal habeas relief The state habeas court found that Medellin "as a private individual, lacks standing to enforce the provisions of the Vienna Convention." State Habeas Record at 216, ¶ 15. Federal law supports the state habeas court's rejection of this claim. The preamble to the Vienna Convention explains that it is "not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States. . . . " On that basis, the Fifth Circuit has refused to recognize that the Vienna Convention "creates judicially enforceable rights of consultation between a detained foreign national and his consular office." *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir.), *cert. denied*, 533 U.S. 962 (2001).[16] If this

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[15] The wisdom in this approach is suggested by the fact that the Supreme Court refused to stay LaGrand's execution, notwithstanding the fact that the ICJ ordered the United States to "take all measures at its disposal to ensure that [LaGrand] is not executed pending the final decision in these proceedings." *LaGrand Case*, 2001 I.C.J. 104, at 32. The Supreme Court's refusal to stay LaGrand's execution raises substantial questions concerning its own view of the ICJ's ability to intrude in American legal proceedings.

[16] In *Beard* [sic], the Supreme Court considered whether the Vienna Convention provided a private, enforceable right. Finding the claim procedurally barred, the Supreme Court did not directly rule on the claim. While the Supreme Court noted that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest[,]" the Supreme Court left the resolution of that issue to the lower courts. 523 U.S. at 376. Since 1970, the United States Department of State has interpreted the Vienna Convention as not creating enforceable individual rights. *See United States v. Li*, 206 F.3d 56, 63 (1st Cir.), *cert. denied*, 531 U.S. 956 (2000). The federal circuit

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Court were to recognize that the Vienna Convention created a personally-enforceable right, such a finding would create a new rule of law, violating the non-retroactivity principle of *Teague v. Lane*. *See Flores v. Johnson*, 210 F.3d 456, 457-58 (5th Cir. 2000) (finding that any recognition of enforceable, individual rights under the Vienna Convention would amount to a new rule of law in violation of Teague's non-retroactivity principle), *cert. denied*, 531 U.S. 987 (2000). The ICJ's rejection of the procedural default doctrine in Vienna Convention cases did not purport to overrule the Supreme Court's weighty Teague jurisprudence. This Court, therefore, cannot grant habeas relief on Petitioner's Vienna Convention claim.

Even if procedural law and non-retroactivity principles did not mandate the denial of this claim, and the Court were to assume that the Vienna Convention created an enforceable right, Petitioner would have to show concrete, non-speculative harm for the denial of his consular rights. *See Breard*, 523 U.S. at 377; *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996), *cert. denied*, 519 U.S. 995 (1996). When a Vienna Convention claim is "properly raised and proven, it is extremely doubtful that the

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courts that have considered the issue have generally refused to address the merits of the question, instead finding that the defendant failed to demonstrate prejudice or sought an unavailable remedy. *See United States v. De La Pava*, 268 F.3d 157, 164-66 (2nd Cir. 2001); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986-88 (10th Cir. 2001); *United States v. Page*, 232 F.3d 536, 540 (6th Cir.), *cert. denied*, 532 U.S. 935 (2001); *United States v. Lawal*, 231 F.3d 1045, 1048 (7th Cir. 2000); *United States v. Chanthadara*, 230 F.3d 1237, 1255 (10th Cir. 2000), *cert. denied*, 122 S. Ct. 457 (2001); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000), *cert. denied*, 531 U.S. 1131 (2001). No circuit court has held that the Vienna Convention creates valid, enforceable individual rights.

violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." *Breard*, 523 U.S. at 377. Medellin contends that the Mexican Consular would have taken immediate steps to secure representation for him and would have advised him not to confess to the rape and murder of the two young girls.

The state habeas court, however, found that Petitioner "fail[ed] to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; [Medellin] was provided with effective legal representation upon [his] request; and, [his] constitutional rights were safeguarded." State Habeas Record at 217, ¶ 16. Petitioner has not shown that this determination was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). Medellin's allegations of prejudice are speculative. The police officers informed Medellin of his right to legal representation before he confessed to involvement in the murders. Medellin waived his right to advisement by an attorney. Medellin does not challenge the voluntary nature of his confession. There is no indication that, if informed of his consular rights, Medellin would not have waived those rights as he did his right to counsel. Medellin fails to establish a "causal connection between the [Vienna Convention] violation and [his] statements." *United States v. Ortiz*, 315 F.3d 873, 886 (8th Cir. 2002). Petitioner has failed to show prejudice for the Vienna Convention violation.[17] This claim is denied.

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[17] Furthermore, Petitioner has not demonstrated that a new trial would be an appropriate remedy under the Vienna Convention. The Vienna Convention does not articulate a specific remedy for its

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III. *Batson* Claim

Medellin claims that the State violated his constitutional rights through the discriminatory use of peremptory challenges. Medellin first raised the issue of discrimination when the State used a peremptory challenge to excuse potential juror Elizabeth Ann Berry. Medellin raised a *Batson*[18] challenge, contending that the State only struck Ms. Berry because she was an African-American woman. Tr. Vol. 20 at 227. After Medellin raised the *Batson* challenge, the following exchange occurred:

> Trial court: Mr. Millin, that's plenty. If you want to put something in rebuttal, that's fine. But there's a Batson challenge on the table. Mr. Vinson, do you want to go ahead and – I will ask that the State, regardless of a prima facie showing, put its explanation on the record at this time because its fresh in everybody's mind. Mr. Millin, if you want to reurge your Batson

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violation. *See Jimenez-Nava*, 243 F.3d at 199. Federal courts generally hold that Vienna Convention violations do not require the dismissal of an indictment or the suppression of evidence. *See De La Pava*, 268 F.3d at 164-66; *Page*, 232 F.3d at 540-41; *Cordoba-Mosquera*, 212 F.3d at 1195-96; *Li*, 206 F.3d at 61-62. The Fifth Circuit has held that reversal is not an appropriate remedy when trial counsel had access to the same information as consular officials. *See Faulder*, 81 F.3d at 520. The Fifth Circuit has also rejected the suggestion that the exclusionary rule should prevent the introduction of confessions taken in violation of the Vienna Convention. *See Jimenez-Nava*, 243 F.3d at 197-98. No court has reversed a capital conviction or set aside a death sentence on the basis of a Vienna Convention violation. This Court questions its ability to overturn Medellin's conviction and sentence under the Vienna Convention, especially in light of his failure to demonstrate prejudice.

[18] *Batson v. Kentucky*, 476 U.S. 79 (1986).

motion at a later time. The jury (sic) is not clearly the reason of selecting a capital murder jury.

The State: I guess the main issue and problem that I have with Ms. Berry is that she has two brothers of which both have been involved in drugs. Both have been to the penitentiary. One, I think, has been on numerous occasions, she testified to. And I think one is released on parole at this time and one is in custody at the penitentiary at this time as well. Moreover, I did not feel comfortable with Mrs. Berry's characterization of the prosecutors as on the attack and defense attorneys as being the underdog. And throughout this trial, I would have a perception in my mind to present my case to Mrs. Berry, she's looking at the defendant as the underdog and I'm the one on attack, like a wild mongrel.

Tr. Vol. 20 at 227-28. The prosecutor also provided relevant personal information relating to his choice of strikes:

The State: Moreover, your Honor, the record as [sic] been silenced on my color. The prosecutor in this case, I would like the record to reflect is a black prosecutor and has an appreciation of blacks serving on juries, having grown up during the 40's, 50's, 60's, 70's, 80's, and 90 –

Trial court: Are you saying you're an old black prosecutor?

The State: That's right.

Trial court: Let the record reflect that Mr. Vinson is African American and he is old. However, he is

The State: And youthful in appearance.

Trial court: However, he looks much younger than his years.

Tr. Vol. 20 at 228-29. In rebuttal, the defense argued that Mrs. Berry expressed an ability to be impartial notwithstanding her brothers' criminal record. Tr. Vol. 20 at 229. The trial court then denied the *Batson* challenge to Mrs. Berry as follows:

Trial court: Let me state that I do not believe that there's a prima facie showing that's been made at this time. However, I find based on observing Ms. Berry's demeanor and her responses and viewing her questionnaire, that Mr. Vinson's reason[s] proffered are racial, neutral reasons. At this time, I will deny any Batson motion. If you'd like to, Mr. Millin, reurge your Batson challenge at the end of the jury selection, I will reconsider it at that time as well. However, let the record reflect at this time – still at this time, our nine-man jury is comprised of a black female, a Hispanic male, a Hispanic female, a black male. . . . And so there's no indication of gender bias. There are – the composition of males to females are a black female, a white female, a Hispanic female, a white female; and with regard to

men, Hispanic male, a white male, a black male, and a second white male.

Tr. Vol. 20 at 230-3 1.

Medellin next raised a peremptory challenge when the State excused potential juror Rafael Rodriguez with a peremptory strike. The trial court found that Medellin made a prima facie case for the purposes of *Batson* by noting that the potential juror was Hispanic and had generally stated that he could be impartial. Tr. Vol. 21 at 117. The State then explained the motivation for striking Mr. Rodriguez:

The State: My reason for striking Mr. Rodriguez is there was a great deal of hesitation with his explanation on the death penalty when he was speaking with you. He's also for the death penalty without any compulsion whatsoever if it happened to one of his relatives. I still do not have a full understanding of his position on the death penalty. With respect to the question I asked him, he gave me a philosophical – he gave a theological and Biblical and his own philosophy. One of the things put me on edge, turning the cheek, you turning the other cheek. That goes back to the philosophy if you're slapped, you turn the other cheek. I'm afraid he may be looking to turn the other cheek in this case, and I don't want it turned in my favor.

Tr. Vol. 21 at 117-18. The trial court found that to be a race-neutral explanation and denied the *Batson* challenge. Tr. Vol. 21 at 118.

After the parties selected the jury panel, Medellin filed a "Motion to Strike Jury Panel." Tr. Vol. I at 260. According to Medellin's count, the State struck eight men and five women. Five of those excluded [sic] white, six were black, and two were Hispanic.[19] Medellin argued that the State based its voir dire strategy on removing minorities and men from the jury panel.

On August 17, 1994, the trial court discussed Medellin's motion to strike the panel in a pretrial hearing. In that hearing, the defense asked the court to quash the entire panel because the State allegedly used its peremptory challenges in a discriminatory manner. Tr. Vol. 26 at 11-12. The State responded to that allegation:

> The State: Your Honor, I think the record will reflect too the final disposition of that jury again is a melting pot jury. And while the State exercised those strikes, I think it was 13 – I don't have mine with me right now. But those are all race neutral strikes.

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[19] In his motion, Medellin noted that the State exercised its peremptory challenges against the following prospective jurors: Kirven O'Neal Tillis, a black male; Mary Freeman, a white female; Kathy Felder, a black female; Bernard Richardson, a black male; Walter Wynn Martin, a white male; Andre McCoy, a black male; Marie Clark, a white female; Vastine Dickie, a black male, Christine Rossie, a white female; Raford Earl Gresham, a white male; Porfirio Rodriguez, a hispanic male; Elizabeth Ann Berry, a black female; and Rafael Rodriguez, a hispanic male. Tr. Vol. I at 264.

Tr. Vol. 26 at 12-13. At that point, the trial court went off the record. The record from that hearing does not reflect any further on-the-record discussion of the *Batson* issue. On August 19, 1994, the trial court entered a written order denying Medellin's motion to strike the jury panel. Tr. Vol. I at 267.

A. *Claim raised on direct review*

On direct appeal, Medellin raised a single Batson claim. Medellin argued that the State violated the equal protection clause with respect to the peremptory strike of Mr. Rodriguez.[20] The Court of Criminal Appeals recognized that the trial court found that Medellin made a prima facie case for discrimination. Opinion at 12. The Court of Criminal Appeals then noted that the State gave a race-neutral explanation for the challenge to Mr. Rodriguez: that his opinion on the death penalty would not make him an attractive juror for the State. Opinion at 12. The Court of Criminal Appeals found that

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[20] Medellin raised this claim under *Batson* and under the relevant state statute prohibiting the use of race-based peremptory challenges. While the Court of Criminal Appeals found that Medellin failed to preserve error on his state law claim, the Court of Criminal Appeals considered the merits of his *Batson* argument. Apparently anticipating that Respondent would rely on the procedural default doctrine to bar this claim, Medellin now argues that appellate counsel rendered ineffective assistance by failing to present a broad *Batson* claim on direct review. Medellin has not shown that he was prejudiced by this failure. Aside from the fact that he fails to show that a *Batson* violation actually existed, Medellin presented the *Batson* claim on state habeas review where it received full consideration by the Court of Criminal Appeals. The state habeas court rejected that claim. There is no reason to suppose that the claim would have fared better on direct review. Medellin fails to show *Strickland* prejudice with respect to the ineffective-assistance-of appellate counsel nuance of his *Batson* claim.

> [t]he trial court accepted these reasons as race-neutral and appellant made no attempt to rebut the explanations given or otherwise explain why they were only pretexts for discrimination. A review of the entirety of the veniremember's voir dire reveals that the prosecutor's reasons were supported by the record. Given this, we cannot say that the judge's ruling in this instance was clearly erroneous.

Opinion at 12.

Medellin renews his *Batson* claim against Mr. Rodriguez in his federal petition. Medellin argues that the lack of clarity in Mr. Rodriguez's opinion on the death penalty does not provide a race-neutral basis for a peremptory strike. Medellin argues that the trial court should have required additional questioning of Mr. Rodriguez. The record indicates, however, that the peremptory strike of Mr. Rodriguez complied with the Supreme Court's *Batson* jurisprudence.

Under *Batson v. Kentucky,* 476 U.S. 79 (1986), the State violates the equal protection clause when it challenges potential jurors solely on the basis of race. A court addresses *Batson* claims under a three-step burden shifting scheme:

> [t]he process for evaluating an objection under *Batson* requires that (1) a defendant make a prima facie showing that the prosecutor has exercised his peremptory challenges on the basis of race, (2) the burden then shifts to the prosecutor to articulate a race-neutral reason for excusing the juror in question, and (3) the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Thompson v. Cain, 161 F.3d 802, 810-11 (5th Cir. 1998); *see also United States v. Montgomery*, 210 F.3d 446, 453 (5th Cir. 2000); *United States v. Bentley-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993). "'The 'shifting burden' described in the *Batson* framework is one of production only.' The party asserting the claim of purposeful discrimination always shoulders the ultimate burden of persuasion." *Soria v. Johnson*, 207 F.3d 232, 239 (5th Cir.) (quoting *Bentley-Smith*, 2 F.3d at 1373), *cert. denied*, 530 U.S. 1286 (2000); *see also Lockett*, 230 F.3d at 707 (citing *Batson* and stating that "[t]he burden of demonstrating that a constitutional violation occurred is, or [sic] course, on a habeas petitioner.").

In the instant case, the trial court called on the State to provide a race-neutral explanation for the use of the peremptory strike against Mr. Rodriguez. "Once a court has taken that step, we no longer examine whether a prima facie case exits." *United States v. Webster*, 162 F.3d 308, 349 (5th Cir. 1998), *cert. denied*, 528 U.S. 829 (1999). This Court's "decision, then, must rest on (1) whether the government articulated race-neutral explanations for the exercise of its challenges and (2) whether [the petitioner] has demonstrated that those justifications are pre-textual and that the government engaged in purposeful discrimination." *Id.*

As previously noted, the State offered several reasons for its peremptory strike of Mr. Rodriguez that were not based on his race. Under the second part of the *Batson* burden-shifting scheme, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (finding the prosecution's explanation that the potential juror had long hair and a beard to be a sufficient race-neutral explanation for the purposes of the

second step of the *Batson* analysis); *see also Hernandez v. New York*, 500 U.S. 352, 359-60 (1991).[21] "In such cases, a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.*; *see also Miller-El*, ___ U.S. at ___, 123 S. Ct. at 1040 ("In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible.").

Medellin now disputes the reasons proffered by the State, pointing to Mr. Rodriguez's testimony in an attempt to show that the State's reasons were baseless or warranted further questioning. "[T]he ultimate inquiry for the judge is not whether counsel's reason is suspect, or weak, or irrational, but whether counsel is telling the truth in his or her assertion that the challenge is not race-biased." *Bentley-Smith*, 2 F.3d at 1375. In *Batson* the Supreme Court noted that the finding of intentional discrimination is a factual finding that "largely will turn on evaluation of credibility." *Batson*, 476 U.S. at 98 n.21. In making such determinations, the trial court evaluates the State's explanation, but also observes the demeanor of the prosecutor and the prospective jurors. *See Jones v. Butler*, 864 F.2d 348, 369 (5th Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989) *Hernandez*, 500 U.S. at 365 (stating that "the best

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[21] "Under *Batson*, a prosecutor's explanation for a peremptory strike need not rise to the level of a challenge for cause; rather, it merely must contain a clear and reasonably specific articulation of legitimate reasons for the challenge." *United States v. Clemons*, 941 F.2d 321, 325 (5th Cir. 1991). At the second step, the "race-neutral explanation tendered by the proponent need not be persuasive, or even plausible." *United States v. Huey*, 76 F.3d 638, 641 (5th Cir. 1996). Indeed, the explanation "simply must be race-neutral and honest." *Webster*, 162 F.3d at 349.

evidence often will be the demeanor of the attorney who exercises the challenge"). "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El*, ___ U.S. at ___, 123 S. Ct. at 1040. In essence, "the decisive question will normally be whether a proffered race-neutral explanation should be believed." *Bently-Smith* [sic], 2 F.3d at 1373.

A state court's credibility determinations are afforded "significant deference" on federal review, especially in light of the AEDPA. *See Miller-El*, ___ U.S. at ___, 123 S. Ct. at 1041.[22] Under the AEDPA, a petitioner bears the substantial burden of showing that a state court erred in its credibility determination. *See id.* at ___, 123 S. Ct. at 1041-42. This Court is bound by the factual findings of the Court of Criminal Appeals unless Medellin can demonstrate by clear and convincing evidence that the presumption of correctness should not apply. *See* 28 U.S.C. § 2254(e)(1).

Under *Batson's* final step, Medellin ultimately bears the burden of establishing that the government engaged in "purposeful discrimination" based on race. *Purkett*, 514 U.S. at 767; *Bentley-Smith*, 2 F.3d at 1373. Here, Medellin "offers no direct evidence of purposeful discrimination, but rather argues that the government's proffered reasons are pretextual. . . ." *Id.* Medellin attempts to prove his case by demonstrating an absence of record support for the

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[22] This deference does not suggest an abdication of judicial review. *See Miller-El*, ___ U.S. at ___, 123 S. Ct. at 1041. A federal court may reject a state credibility finding so long as a petitioner complies with the AEDPA's stringent standards. *See id* at ___, 123 S. Ct. at 1041.

reasons offered by the State; however, even if the reasons advanced by the State are only weakly supported by the record, the thrust of this Court's analysis concerns the State's intent in seeking the peremptory strike. *See Bently-Smith* [sic], 2 F.3d at 1373-74 (stating that as a general rule, "[t]here will seldom be any evidence that the claimant can introduce – beyond arguing that the explanations are not believable or pointing out that similar claims can be made about non-excluded jurors who are not minorities"). While Medellin now asks this Court to find that the reasons advanced by the State during jury selection were pre-textual, he must also demonstrate that the State engaged in purposeful discrimination on the basis of race or gender. The record supports a finding that the State did not exercise its peremptory challenge on account of race or gender. The State struck Mr. Rodriguez for his opinion on the death penalty. That excuse is sufficiently race-neutral to survive a *Batson* challenge.

After a review of the record, this Court finds Medellin has not demonstrated why the deference to the trial judge's implicit determination concerning the prosecution's intent should be called into doubt. Accordingly, Medellin has not provided clear and convincing evidence that the state court findings were incorrect. *See* 28 U.S.C. § 2254(e)(1). Medellin has also failed to demonstrate that the state court's decision rejecting the *Batson* claim against Mr. Rodriguez was "an unreasonable determination of the facts in light of the evidence. . . . " 28 U.S.C. § 2254(d)(2).

B. *Claim raised on state habeas review*

On state habeas review, Medellin raised the expansive *Batson* claim which he now presents in his federal petition. As opposed to the challenge to Mr. Rodriguez's dismissal raised on direct review, Medellin's state habeas claim broadly challenged the State's motive in exercising all of its peremptory challenges. Medellin argued that he made a prima facie showing that the State's practice in jury selection was to remove all African American and male jurors. To establish the alleged pattern of discriminatory strikes, Medellin relied only on the fact that the State used six of its thirteen peremptory strikes to remove minority potential jurors and also used eight to excuse men, resulting in a pattern of discriminatory strikes. Medellin also criticized the trial court for not making the State provide a race-neutral reason for each of those strikes when he raised the issue after the impanelment of the jury.

The state habeas court rejected this claim. The state habeas court first reviewed the voir dire of Elizabeth Ann Berry, the only potential juror other than Mr. Rodriguez specially identified by Medellin on habeas review as being subject to a discriminatory strike. The state habeas court found that the State's explanation for striking Ms. Berry, that she had brothers who were incarcerated and displayed a manner favoring the defense, was race neutral. State Habeas Record at 199, ¶¶ 5-9, 11. The state habeas court also relied heavily on the prosecutor's credibility. The state habeas court noted that the prosecutor was himself black. State Habeas Record at 200, ¶10. The state habeas court specifically noted previous cases in which the prosecutor had exercised peremptory challenges without

discriminatory motive. State Habeas Record at 202-03, ¶¶ 25-26.

The state habeas court concluded that Medellin's motion in which he merely described the composition of the peremptory strikes failed to establish a prima facie case of discrimination. State Habeas Record at 213, ¶ 3. The state habeas court found that the prosecution employed racially-neutral strikes. State Habeas Record at 214, ¶¶ 4-5. Accordingly, the state habeas court also found that appellate counsel's failure to raise a broad *Batson* claim on direct review did not violate Medellin's constitutional rights. State Habeas Record at 214, ¶ 7.

The state habeas court's decision on this issue was not unreasonable in light of the facts of this case. Medellin based his arguments to the trial court only on an alleged pattern of strikes used by the State. Those strikes, however, did not demonstrate a markedly disproportionate application against members of a particular racial group or gender. The composition of the jury in this case does not suggest the exclusion of a cognizable group. The state habeas court found that Medellin did not make a prima facie case for discrimination; this Court agrees.[23]

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[23] Medellin argues that he made a prima facie case for discriminatory intent, but also claims that the State did not provide any race-neutral explanation for its strikes. Generally, once a State provides a race-neutral explanation the question of whether a defendant has made a prima facie case becomes moot. *See Ladd v. Cockrell*, 311 F.3d 349, 355 (5th Cir. 2002). Here, the trial court did not ask the State to explain its strikes; the State addressed the defense's objection on its own initiative. Tr. Vol. 26 at 12. The State's explanation, that the jury represented a "melting pot," challenged the establishment of a prima facie case.

After the State challenged the defense's prima facie case, the trial court went off the record. The record is silent as to whether the trial court and the parties continued discussing the *Batson* challenge. Medellin has not provided affidavit or other evidence that would indicate what transpired during the off-the-record discussion. The discussion, however, is of no moment. Medellin has failed to make a prima facie case of discrimination, both in state and federal court. While a *Batson* challenge may rest on either the discrete circumstances of a particular strike or a showing of historic, systemic discrimination, *see Batson,* 476 U.S. at 96, Medellin only shows that, while accepting minority and male jurors, the State struck some African-Americans and men. He has not shown a "pattern of strikes" against a protected group. *See id.* at 97. The absence of a pattern is evident from the fact that at least four minorities and an equal number of men and women served as jurors at trial.

The state court also made a credibility determination that must be presumed correct under 28 U.S.C. § 2254(e)(1). The state habeas court, based on its experience with the prosecutor and on its observation of the proceedings, found that the State did not engage in discrimination. Medellin makes no showing to the contrary. The record before the Court would suggest that the state determination is correct. The state court's rejection of this claim was not unreasonable. *See* 28 U.S.C. § 2254(d)(2). This claim is denied.

IV. *Brady* Claim

Medellin contends that the State failed to disclose material evidence before trial. Medellin argues that the

State violated his constitutional rights by not disclosing the fact that one witness at trial, Joe Cantu, had previously been arrested for an unrelated charge that had been dropped. Medellin assumes that the State dropped the charges in exchange for his trial testimony. Also, Medellin argues that the State failed to disclose important impeachment evidence by not passing along the fact that Joe Cantu and his wife unsuccessfully sought compensation and protection from the police in return for their testimony.

A. *Background*

Before trial, Medellin requested that the State turn over any exculpatory evidence, including "[a]ny 'deals,' whether expressly written or implied, to any individual who agrees to testify for the State in this case." Tr. Vol. I at 44, 67-74. In an August 17, 1994, pre-trial hearing, the State agreed to "run out of an abundance of precaution the criminal records of any witnesses." Tr. Vol. 26 at 28. The trial court also ordered the State to provide the defense with information about any witness' "final convictions and felonies," along with any witness' placement on deferred adjudication. Tr. Vol. 26 at 29. The, trial court then questioned the need for disclosure of arrest records:

Trial court:	Why would arrest records be relevant?
Trial counsel:	Well, Your Honor, it could possibly go to any kind of agreements that could possibly have been made. I certainly don't believe there are any.
Trial court:	You have a separate motion for that?

Trial counsel: Right. But that's why it could possibly be relevant in this motion as well.

Trial court: Well, the arrest records I don't believe are relevant except and to the extent that they provide the basis for some type of an agreement by the District Attorney's Office. So articulate some reason why they might be or some bias

Trial counsel: In other words, if somebody has a case dismissed in order that he might testify.

Trial court: I think your Motion to Disclose or to Reveal the Agreements –

Trial counsel: That covers – that should cover it.

Trial counsel: So then denied as to the arrest records and granted as to the conviction records, is that correct?

Trial court: Yes. And the conviction includes things like deferred adjudication and probation and, of course, your Brady Motion covers all of this. So if there is something that is somehow exculpatory about an arrest –

Trial counsel: The State's witness –

Trial court: Right. Or if it reveals some type of bias on the part of the witness, I expect that it should be disclosed under –

Trial counsel: Under Brady.

The State: Okay.

Trial court: Okay.

Tr. Vol. 26 at 30-31. In that hearing, the parties also discussed the fact that the State had assured that it made no agreements with the witnesses in this case. Tr. Vol. 26 at 32-33.

On state habeas review, Medellin claimed that the State failed to disclose the arrest of Joe Cantu for making terroristic threats.[24] At trial, Joe Cantu and his wife Christina related statements made to them by Medellin after he participated in the rape and murder of the two young victims. Joe and Christina Cantu's testimony helped establish Medellin's precise role in the girls' death. Trial counsel asked Joe Cantu at trial whether he had entered into any deal in exchange for his testimony:

Trial counsel:	Have you, Mr. Cantu, received anything from the State in the way of any assistance, anything like that, to secure your presence as a witness?
Mr. Cantu:	I don't understand your question.
Trial counsel:	Have you been given anything by the State in order for you to be available to testify?
Mr. Cantu:	Just that I won't be prosecuted for anything that I say.
Trial counsel	And did the State talk to you about the possibility of you being prosecuted for you pawning that stolen necklace?
Mr. Cantu:	No.

[24] Joe Cantu was the brother of one of Medellin's co-defendants and a former member of Medellin's gang.

Trial counsel: They did make an agreement not to prosecute you if you did testify?

Mr. Cantu: They didn't say nothing about that.

The State: We made no agreement with this –

Trial court: Approach the bench.

(WHEREUPON, there was a discussion held off the record outside the hearing of the court reporter)

Trial counsel: So, anyway, Mr. Cantu, you testified that it was agreed that you wouldn't be prosecuted for anything you said today; is that right?

Mr. Cantu: Not today but in the previous –

Trial counsel: Okay. In the previous – you've already testified in several trials; is that right?

Mr. Cantu: Right.

Tr. Vol. 30 at 544-45. Medellin argues that Joe Cantu lied; he contends that evidence produced during the state habeas proceedings shows that the State entered into a deal to secure Mr. Cantu's testimony.

Medellin bases his claim on an affidavit from Christina Cantu. Christina Cantu's affidavit describes information about her and her husband's testimony that was not presented to the defense. Christina Cantu describes how she asked the prosecution about the possibility of a reward in exchange for their testimony, but states that the police told her that the available award money in this case went to another individual. Christina Cantu also states that the State promised her "protection as a witness," but that "never occurred." Because of that, she was "physically

beaten at school several times." Christina Cantu also provides details about Joe Cantu's arrest for making terroristic threats:

> Around the time that Jose Medellin went to trial, my husband, Joe Cantu, was arrested for threatening to blow up his place of employment, American Plasma. Joe's brother, Rudy Cantu, informed me of this arrest. I contacted Gail Hayes of the Harris County District Attorneys Office and she stated she was aware of Joe's arrest. Joe was in jail for two days. When he was released he informed me that he spoke with Gail Hayes and that she contacted an attorney for him. I know that Joe went to court one time on this case, but I do not believe he was ever charged or paid a fine. I have never informed anyone about Joe's arrest.

(Docket Entry # 12, Exhibit E). Medellin supports the information contained in Christina Cantu's statement with an affidavit from his trial counsel, Linda Mazzagatti. Trial counsel states that

> With respect to Joe Cantu and Christina Cantu, [current federal habeas counsel] asked me whether I remembered receiving any information, from the District Attorney's Office or elsewhere, that Jose Cantu was arrested for threatening to blow up his place of employment. I have no independent memory of ever learning such information, and my records do not reflect such information.

(Docket Entry # 12, Exhibit G). An investigator's affidavit indicates that the State filed charges against Joe Cantu on

June 23, 1994, and then dismissed those charges due to insufficient evidence shortly before Medellin's trial. (Docket Entry # 12, Exhibit I).

Medellin argues that the existence of a deal between the State and Joe Cantu requires reversal of his conviction. Medellin states that

> Joe Cantu's testimony in particular appeared to be credible because he testified against his brother and friends, for no discernable reason. However, had the jury learned that Joe Cantu and Christina were expecting "witness protection," considering the possibility of a reward, currently charged with a criminal offense and represented by an attorney secured by the prosecutors, reasons for the Cantu's testimony. Clearly, such impeachment information was "material" in this case.

(Docket Entry # 12 at 39-40).

In state habeas court, the State produced an affidavit from the prosecutor in this case. The prosecutor stated that he did not enter into any agreements with the Joe or Christina Cantu in exchange for their testimony. State Habeas Record at 108. The prosecutor stated that "I was not involved in Joe Cantu's misdemeanor case and had nothing to do with the ultimate disposition of his case." State Habeas Record at 108. The prosecutor affirmed that he made no promise to the Cantus for a reward in exchange for their testimony. State Habeas Record at 108. Marie Munier, a prosecutor from one of Medellin's co-defendants also submitted a statement wherein she related that she knew about Joe Cantu's arrest, but did not make any deals with him in exchange for his testimony. State Habeas Record at 111. That prosecutor stated

that she made no promise for a reward in exchange for Joe and Christina Cantu's testimony. State Habeas Record at 111.

The State also submitted an affidavit from Gail Hayes, an investigator who worked for the Harris County District Attorney's Office. Ms. Hayes stated that in her investigation of this case "Joe and Christina Cantu asked me about the Crime Stoppers reward money. Subsequently, I learned that the Crime Stoppers money had been given to Christina's sister. I never promised or made assurances to either Joe or Christina Cantu that they would receive any reward money in exchange for cooperation or testimony." State Habeas Record at 114-15. Ms. Hayes also stated that she did not promise any protection or deal to Mr. or Mrs. Cantu in exchange for their testimony. State Habeas Record at 115. Ms. Hayes also addressed the question of Joe Cantu's arrest:

> Prior to trial, Christina Cantu telephoned me and told me that Joe Cantu had been arrested. Joe Cantu was working at a plasma clinic, got into an argument with someone, made a statement about "blowing the place up," and was subsequently arrested. I informed Marie Munier about Joe Cantu's arrest either that night or the next business day. I have no knowledge of any events concerning Joe Cantu's arrest after that time. I did not recommend a lawyer or give any lawyer's name to either Christina or Joe Cantu. I made no promises concerning the disposition of Joe Cantu's case or concerning his incarceration. I was not aware of the disposition of Joe Cantu's arrest until I talked with Assistant District Attorney Roe Wilson in December, 1999.

State Habeas Record at 115. The State also submitted an affidavit from Joni M. Vollman, the prosecutor in Joe Cantu's terroristic threat case. That prosecutor testified that the State did not make any deal with Joe Cantu in exchange for dismissing the charges against him. Instead, the State dismissed the terroristic threat case for a lack of evidence. State Habeas Record at 172. This testimony is confirmed by a copy of the State's Motion to Dismiss in that case. State Habeas Record at 220. The motion indicates that the charges were dismissed for "insufficient evidence." State Habeas Record at 220.

The state habeas court rejected Medellin's claim that the State violated his constitutional rights by not disclosing material exculpatory information prior to trial. The state habeas court reviewed the affidavits submitted by the State and found each to be credible. State Habeas Record at 210-21, ¶57-62. Finding the information contained in those affidavits did not indicate the existence of any deal between the State and Joe Cantu that resulted in the dismissal of his misdemeanor charge, the state habeas court issued the following legal conclusion:

> The applicant fails to show that there was any deal between the State and Joe and Christina Cantu; thus, the applicant fails to show that the State did not disclose material evidence, i.e., a non-existent agreement between Joe and Christina in exchange for their testimony during the applicant's trial. The applicant fails to show that the State did not disclose a non-existent agreement or any alleged favorable and material information in the instant case. United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976); United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985) (holding that evidence is material where

> there is a reasonable probability that, if disclosed, result of the proceeding would have been different). The applicant fails to show that he was denied due process under U.S. Const. amend. XIV and Tex. Const. art. 1, § 10.

State Habeas Record at 217-18 ¶18. Medellin is entitled to habeas relief if the state court's rejection of his claim was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). Medellin has failed to support his AEDPA burden with respect to this claim.

B. *Legal standard*

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." *Brady v. Maryland,* 373 U.S. 83, 87 (1963); *see also Little v. Johnson,* 162 F.3d 855, 861-62 (5th Cir. 1998), *cert. denied,* 526 U.S. 1118 (1999). There are three elements required for a valid *Brady* claim: (1) the prosecution must suppress or withhold evidence, (2) which is favorable to the defense, and (3) material to either guilt or punishment. *See United States v. Lowder,* 148 F.3d 548, 550 (5th Cir. 1998); *In re Smith,* 142 F.3d 832, 836 (5th Cir. 1998); *East v. Johnson,* 123 F.3d 235, 237 (5th Cir. 1997). Evidence is "material" under *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would be different. *See Williams v. Puckett,* 283 F.3d 272, 279 (5th Cir. 2000), *cert. denied,* ___ U.S. ___, 123 S. Ct. 504 (2002).

C. *Failure to prove the existence of Brady material*

The thrust of Medellin' argument is that the State should have disclosed the existence of a deal wherein Joe Cantu's terroristic threat charge would be dropped in exchange for his testimony. Yet Medellin has never presented concrete evidence that such an agreement existed. Instead, Medellin rests his argument on the speculation that the State dismissed that charge as part of a secret deal. "Such speculation does not support a *Brady* claim." *Hughes v. Johnson,* 191 F.3d 607, 630 (5th Cir.1999), *cert. denied,* 528 U.S. 1145 (2000); *see also United States v. Dierling,* 131 F.3d 722, 736 (8th Cir. 1997) ("Mere speculation that the government had exculpatory evidence is an insufficient basis for a Brady claim. . . . "), *cert. denied,* 523 U.S. 1066 (1998); *United States v. Van Brocklin,* 115 F.3d 587, 594 (8th Cir. 1997) ("Mere speculation that materials may contain exculpatory evidence is not, however, sufficient to sustain a Brady claim."), *cert. denied,* 523 U.S. 1122 (1998). Medellin's claim is based on nothing more than insinuation. Medellin has not presented any factual allegation that would call into doubt the state habeas court finding that there was no deal with Joe Cantu.

Medellin's argument rests largely on the supposition that there must have been a deal because the State did not try Joe Cantu after his misdemeanor arrest. This argument fails to acknowledge the record evidence that strongly shows that charge was dismissed for insufficient evidence. Medellin has not produced any clear and convincing evidence that would show otherwise, and has failed to produce any competent summary judgment evidence that would demonstrate the existence of a "deal," much less the suppression of a "deal" by the State. Habeas

relief is unavailable on *Brady* claims based only on unsupported inferences.

Further, habeas relief is unavailable on the claim that the State failed to divulge Joe Cantu's arrest, independent of any deal. Through pretrial motions, the defense requested that the State provide information about the arrest record of its witnesses. However, in the pretrial hearing the defense agreed that the State would only turn over information about felony arrests and convictions. Tr. Vol. 26 at 28-31. It is undisputed that Joe Cantu had been arrested for a *misdemeanor* charge. As the defense agreed to the limitation of disclosure to felony offenses and convictions, Medellin cannot complain now that he did not know about Joe Cantu's arrest.

D. *Failure to prove materiality*

Even accepting as true Medellin's claim that the State failed to disclose information concerning Joe Cantu's arrest, his "deal," and the Cantus' request for a reward from Crime Stoppers and physical protection, he has failed to show materiality under *Brady*. The materiality standard for *Brady* claims focuses on whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The failure to provide the defense with the challenged information, insofar as it is correct, did not "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *see also Strickler v. Greene*, 527 U.S. 263, 290 (1999) (finding

evidence to be not material if there is only "a reasonable possibility that either a total, or just a substantial, discount of [a witness's] testimony might have produced a different result").

Medellin is correct in noting that the State placed great importance on Joe and Christina Cantu's testimony at trial. Nonetheless, they did not come before the jury unblemished. Trial testimony made the jury aware that the both had long participated in gang activity. Joe had been a member of the same gang as Medellin; Christina belonged to the "Heights" gang whose primary objective was "[s]tealing cars, jumping people." Tr. Vol. 29 at 433. The jury knew that Joe and Christina Cantu had destroyed physical evidence related to the murders and had pawned some of the victims' jewelry. The jury would not be surprised at the production of a criminal arrest record or at the presence of additional motives for testifying. Even so, the jury also knew that Joe Cantu agreed to testify against his own brother and that the Cantus had reasons to come forward other than for personal gain. In other words, the introduction of the information that Medellin claims was suppressed would have had little impeachment value.

In addition, substantial and convincing evidence of Medellin's role in the murders existed independent from the testimony from Mr. and Mrs. Cantu. A member of the gang who left before they began raping the girls placed Medellin at the scene of the murders. Tr. Vol. 28 at 235-37. Medellin gave some of the victims' jewelry to his girlfriend. Tr. Vol. 31 at 743-50. Most importantly, Medellin confessed to the rape and murder of the two girls. In highly disparaging language, Medellin described his involvement in the tortuous rapes and killings. Medellin's

confession admitted, at a minimum, to his sexual assault of the victim for whose death he was convicted. Also, his confession admitted that he "h[eld] one end of the shoe lace" used to strangle the victim. Simply, "[t]he record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if [Joe and Christina Cantu] had been severely impeached." *Strickler*, 527 U.S. at 294. There is no reasonable probability of a different outcome had the defense received the information that Medellin claims was withheld.

The state court did not unreasonably conclude that Medellin failed to establish that a constitutional violation tainted his trial. *See* 28 U.S.C. § 2254(d)(1). This claim is denied.

V. Exclusion of Potential Juror

Medellin challenges the trial court's exclusion of potential juror Rosie L. Mackey for cause. When asked by the trial court whether she had any opposition to the death penalty she answered: "Religious beliefs. Thou shall not kill." Tr. Vol. 18 at 215. Ms. Mackey acknowledged a conflict: "I could follow the law; but, like I say, it's my religious belief. The law says one thing, and the religious belief says another." Tr. Vol. 18 at 216. Nonetheless, she indicated that she could impose a death sentence "if the evidence called for it." Tr. Vol. 18 at 216.

The State then questioned Ms. Mackey. The State focused on the statement in Ms. Mackey's jury questionnaire that she was "opposed to capital punishment under any circumstances." Tr. Vol. 18 at 218. She also indicated that she did not want to serve as a juror because of her

religious convictions. Tr. Vol. 18 at 219. Ms. Mackey affirmed that her religious beliefs would impair her ability to return a death sentence in this case, and that, in fact, she would try to find a way to give a life sentence. Tr. Vol. 18 at 221-23.

Trial counsel then questioned Ms. Mackey about her ability to serve as an impartial juror. Ms. Mackey stated that she would be able to consider the guilt/innocence issues without any problem. Tr. Vol. 18 at 228-29. When asked if she could answer the special issues in a manner requiring the imposition of a death sentence, she stated "I still would have a hard time with it. I could vote like that, but I still would have a hard time within myself." Tr. Vol. 18 at 229-30. Even so, she could not imagine a case in which she would be able to impose a death sentence, except that of Adolf Hitler. Tr. Vol. 18 at 230-31.

> The State again questioned Ms. Mackey and she clarified her position on serving as a juror:
>
> My religious belief is I don't believe in the death penalty. That was why I was asking if I could be excused from being in this jury or this case. I even stated on the paper – I remember on the back page that it stated: Would you want to be a juror in this case; I stated no.

Tr. Vol. 18 at 234. The trial court continued questioning Ms. Mackey. Ms. Mackey testified that she would be inclined to answer the special issues in such a way to ensure a life sentence, and would look at the evidence with that result in mind. Tr. Vol. 18 at 237.

The State moved to have Ms. Mackey excused for cause because of her inability to consider a death sentence. Tr. Vol. 18 at 238. Trial counsel opposed that motion. Tr.

Vol. 18 at 238. The trial court then made the following findings:

> The Court makes specific findings in the standard set forth in Wainwright versus Witt in that I think Ms. Mackey is the classic vacillating juror.
>
> Based on her responses to the questionnaire, which she had validated in her oral responses to the Court, the Court finds that her strong feelings against capital punishment would prevent or substantially impair her performance as a juror in accordance with her oath and the Court's instructions, specifically her strong religious background which Mr. Vinson certainly established, her checking that she was opposed to capital punishment under any circumstances.
>
> * * *
>
> The Court finds Ms. Mackey should be excused for cause.

Tr. Vol. 18 at 238-239.

Medellin raised this claim on direct review. After reviewing the applicable law and the voir dire transcript, the Court of Criminal Appeals stated that "[g]iven the totality of the voir dire, we cannot say that the trial court abused its discretion in sustaining the State's challenge for cause to the veniremember." Opinion at 10. This Court reviews that decision under the AEDPA.

Exclusion of prospective jurors "hesitant in their ability to sentence a defendant to death" without any limitations violates the Fourth and Fourteenth amendments. *Morgan v. Illinois*, 504 U.S. 719, 732 (1992); see also *Adams v. Texas*, 448 U.S. 38, 45 (1980); *Witherspoon v.*

Illinois, 391 U.S. 510, 521-22 (1968). The State must demonstrate through questioning that the potential juror it seeks to exclude lacks impartiality, and the judge must then determine whether the state's challenge is proper. *See Wainwright v. Witt,* 469 U.S. 412, 423 (1985). Thus, the key issue is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting *Adams,* 448 U.S. at 45). "This standard . . . does not require that a juror's bias be proved with 'unmistakable clarity.'" *Wainwright,* 469 U.S. at 424. Thus, a reviewing court gives deference to a trial judge who could observe the demeanor of the potential juror. *Id.* at 424-26. This deference is consistent with AEDPA's presumption of correctness.

The exclusion of potential jurors is a question of fact. *See McCoy v. Lynaugh,* 874 F.2d 954, 960 (5th Cir. 1989); *Patton v. Yount,* 467 U.S. 1025, 1036 (1984). The factual determinations of the Texas Court of Criminal Appeals are presumed to be correct, and the petitioner has the burden of rebutting these determinations by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). This Court can grant federal habeas relief only if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also Fuller v. Johnson,* 114 F.3d 491, 500-01 (5th Cir.) (holding that a trial court's finding of juror bias is entitled to a presumption of correctness), *cert. denied,* 522 U.S. 963 (1997); *Granviel v. Lynaugh,* 881 F.2d 185, 187 (5th Cir. 1989) (stating that "[b]ecause of the difficulty of divining a prospective juror's state of mind, particularly on a cold record, we pay

deference to the trial court's factual determination"), *cert. denied,* 495 U.S. 963 (1990).

> The trial court found that Ms. Mackey exemplified the juror described in *Wainwright v. Witt*:
>
> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

469 U.S. at 424-25 (footnote omitted). The state court's characterization of Ms. Mackey as a vacillating juror is presumed correct because Medellin has not rebutted the finding with appropriate evidence. *See* 28 U.S.C. § 2254(e)(1). After reviewing the record, this Court is in agreement with Respondent's assertion that the state court's finding was reasonable in light of Ms. Mackey's responses. *See* 28 U.S.C. § 2254(d)(2). Because the trial court clearly could have been "left with the definite impression that [Ms. Mackey] would be unable to faithfully and impartially apply the law," *Witt,* 469 U.S. at 426, the trial court had a reasonable basis for granting the State's challenge for cause. In short, Medellin has failed to demonstrate that the state court disposition "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state

court proceeding." *See* 28 U.S.C. § 2254(d)(2). This claim is denied.

CERTIFICATE OF APPEALABILITY

Although Medellin has not yet requested a Certificate of Appealability ("COA"), the issue of a COA is likely to arise. This court may deny a COA *sua sponte*. *See Alexander v. Johnson,* 211 F.3d 895, 898 (5th Cir. 2000).[25] The Supreme Court has explained the standard for evaluating the issuance of a COA as follows:

> Where a district court has rejected the constitutional claims on the merits, the showing required

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[25] The Supreme Court in *Miller-El v. Cockrell,* ___ U.S. ___, 123 S. Ct. 1029 (2003), recently reversed a case from the Fifth Circuit involving the COA standard. Prior to *Miller-El,* the Fifth Circuit resolved the question of COA in some cases by first determining whether a petitioner was entitled to relief and then denying COA because the appeal lacked merit. In *Miller-El,* the Supreme Court clarified a *circuit court*'s role in the COA process. The *Miller-El* Court found that a circuit court's COA analysis should not rest upon a "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El,* ___ U.S. at ___, 123 S. Ct. at 1039 (2003). Rather, "[t]he COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* at ___, 123 S. Ct. at 1039 (emphasis added). Thus, the Supreme Court held that "[w]hen a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying the denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* at ___, 123 S. Ct. at 1039. A district court's evaluation of the COA *sua sponte* does not raise the same jurisdictional concerns present in *Miller-El.* While *Miller-El* rejected the Fifth Circuit's review of the merits of a claim before that claim was properly before the circuit court, the same jurisdictional concern is not present when a district court evaluates a COA *sua sponte* before appeal. This Court clearly has jurisdiction to decide *sua sponte* whether a COA is warranted.

> to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also Miller-El,* ___ U.S. at ___, 123 S. Ct. at 1039-40.

The Court has carefully considered each of Medellin's claims. While the issues Medellin raises deserve scrutiny, the Court finds that each of his claims is foreclosed by clear, binding precedent. Under the appropriate standards, this Court concludes that Medellin has failed to make a "substantial showing of the denial of a constitutional right" with respect to each issue raised in his petition. 28 U.S.C. § 2253(c)(2). This Court concludes that Medellin is not entitled to a COA on any of his claims.

CONCLUSION

Based on the foregoing, the Court concludes that Medellin is not entitled to federal habeas relief. As a result, it is hereby

ORDERED that Respondent's Motion for Summary Judgment (Docket Entry # 16) is Granted. It is further

ORDERED that Jose Ernesto Medellin's Petition for Writ of Habeas Corpus is **DENIED**, this case is **DISMISSED WITH PREJUDICE**, and a Certificate of Appealability will not issue.

The Clerk will provide copies of this Order to the parties.

SIGNED this 25th day of June, 2003.

JOHN D. RAINEY

John D. Rainey
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-01-4078

JOSE ERNESTO MEDELLIN,

Petitioner,

– v. –

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

FINAL JUDGMENT

(Filed June 26, 2003)

For the reasons stated in the Court's Order denying habeas relief and granting summary judgment in favor of Respondent, it is **ORDERED** that this case be dismissed with prejudice. The Court **DENIES** a certificate of appealability.

THIS IS A FINAL JUDGMENT.

SIGNED this 25th day of June, 2003.

JOHN D. RAINEY
John D. Rainey
United States District Judge